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IN THE

# Supreme Court of the United States

October Term, 1973.

## No. 73-244

MAIN LINE BOARD OF REALTORS, a Non-Profit Corporation, WILLIAM P. HUTTON, WILLIAM T. ANDREWS, ROBERT J. DOWNS, FRANK N. WARE, JR., Individually and as Officers and Directors of MAIN LINE BOARD OF REALTORS,

*Petitioners,*

*v.*

MARGARET HILL COLLINS and SUBURBAN FAIR HOUSING, INC.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

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## TABLE OF CONTENTS.


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented for Review | 3 |
| Contitutional Provisions Involved | 4 |
| Statement of the Case | 5 |
| Reasons Why Certiorari Should Be Allowed | 14 |
| Argument | |
| 1. The Pennsylvania Supreme Court Directive to the Main Line Board of Realtors to Admit Non-Member Licensed Brokers to Its Multiple Listing Service Is a Deprivation of Property and an Unwarranted Interference With the Contractual Freedoms Guaranteed in the Fifth and Fourteenth Amendments | 14 |
| 2. Compliance With the Court Directive Will Result in an Unwarranted Interference With the Contractual Freedoms of Each Member in That Each Member Is Ordered to Contract With Others in a Multiple Listing Agreement, Which Involves Performance of Personal Services and Division of Commissions | 17 |
| 3. The Multiple Listing System of the Main Line Board of Realtors Is Not a Violation of Restraint of Trade, Either Under the Per Se or Rule of Reason Analysis | 31 |
| Conclusion | 45 |
| Appendix "A". Opinion [Majority] of the Supreme Court of Pennsylvania, Eastern District [4-3 Decision—Manderino, Nix, Eagen, JJ.]—Reversing Unanimous Opinion of Court en Banc [3 Judges] of the Court of Common Pleas of Montgomery County, Pennsylvania | A1 |
| Appendix "B". Dissenting Opinion—Supreme Court of Pennsylvania Eastern District—[Jones, C. J., O'Brien and Roberts, JJ.] | A10 |
| Appendix "C". Concurring Opinion—Supreme Court of Pennsylvania—Eastern District [Pomeroy, J.] | A18 |
| Appendix "D". Opinion Sur Exceptions to Adjudication, Court of Common Pleas of Montgomery County, Pennsylvania | A24 |
| Appendix "E". Adjudication, Court of Common Pleas of Montgomery County, Pennsylvania | A30 |

## TABLE OF CITATIONS.

**Cases:** Page


Adair v. United States, 208 U. S. 161 (1908) ..... 19
Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U. S. 308 (1968) ..... 30
American Federation of Labor v. Swing, 312 U. S. 321 (1941) 30
American Institute of Real Estate Appraisers v. Hawk, 436 S. W. 2d 359 (Civ. App., Tex., 1968) ..... 28
Anderson v. East Suburban Multilist Real Estate Brokers, Inc., 115 P. L. J. 248 (C. P. Allegheny 1967) ..... 41
Anthony Wayne Terrace Housing Association v. Bedio, 186 Pa. Super. 335, 142 A. 2d 482 (1958) ..... 26
Associated Press v. United States, 326 U. S. 1 (1945) ..... 34
Baltimore Co. Hosp. v. Md. Hosp., 234 Md. 427, 200 A. 2d 39 (1964) .....23, 43
Berberian v. Lancaster Osteopathic Hospital Association, 395 Pa. 257, 145 A. 2d 456 (1959) ..... 26
Blenko v. Schmeltz, 362 Pa. 365, 67 A. 2d 99 (1949) .....17, 25
Bloom v. Illinois, 391 U. S. 194 (1968) ..... 20
Board of Trade of Chicago v. United States, 246 U. S. 231 (1918) ..... 33
Bolling v. Sharpe, 347 U. S. 497 (1954) ..... 20
Bullard v. Austin Real Estate Board, Inc., 376 S. W. 2d 870 (Civ. App., Tex. 1964) ..... 28
Chas. Wolff Packing Company v. The Court of Industrial Relations of Kansas, 267 U. S. 552 (1925) ..... 19
Cunningham v. Burbank Board of Realtors, 68 Cal. Rptr. 653 (Ct. App. 1968) ..... 28
Deesen v. Professional Golfers' Association of America, 358 F. 2d 165 (9th Cir. 1966), cert. den., 386 U. S. 846 (1966) ..... 34
Elizabeth Hospital, Inc. v. Richardson, 167 F. Supp. 155 (W. D. Ark., 1958), aff'd 269 F. 2d 167 (8th Cir. 1959), cert. den., 361 U. S. 884 (1959) .....15, 42
Falcone v. Middlesex Medical Society, 34 N. S. 582, 170 A. 2d 791 (1961) ..... 39
Gordon v. Tomei, 144 Pa. Super. 449, 19 A. 2d 588 (1941) ... 17
Gremplar v. Multiple Listing Bureau of Hartford County, Inc., 258 Md. 419, 266 A. 2d 1 (Ct. App. 1970) ..23, 31, 32, 39
Grillo v. Board of Realtors, 91 N. J. Super. 202, 219 A. 2d 635 (1966) .....16, 31, 36, 38, 39, 40, 41

## TABLE OF CITATIONS (Continued).

**Cases (Continued):** Page


Hoey v. San Antonio Real Estate Board, 297 S. W. 2d 214 (Civ. App., Tex., 1956) ..... 28
Kassab v. Medical Services Association of Pennsylvania, Inc., 425 Pa. 630, 230 A. 2d 205 (1967) ..... 24
Kearns v. Howley, 188 Pa. 116, 41 A. 273 (1898) ..... 23
Kronen v. Pacific Coast Society of Orthodontists, 46 Cal. Rptr. 808 (Ct. App. 1965) ..... 22
McKane v. Adams, 123 N. Y. 609, 25 N. E. 1057 (Ct. App. 1890) ..... 24
Medical Society of Mobile County v. Walker, 245 Ala. 135, 16 So. 2d 321 (1944) ..... 23
Metropolitan Baseball Association v. Simmons, 17 Phila. 419 (1884) ..... 25
Meyer v. Nebraska, 262 U. S. 390 (1923) ..... 19
N. A. A. C. P. v. Alabama ex rel. Patterson, 357 U. S. 449 (1958) ..... 30
Nebbia v. New York, 391 U. S. 502 (1934) ..... 19
Northern Pacific R. Co. v. United States, 356 U. S. 1 (1958) 31
Oates v. Eastern Bergen County Multiple Listing Service, Inc., 113 N. J. Super. 371, 273 A. 2d 795 (1971) ..... 41
Riggall v. Washington County Medical Society, 249 F. 2d 266 (8th Cir. 1957) ..... 15, 42
Ross v. Ebert, 275 Wis. 523, 82 N. W. 2d 315 (1957) ..... 23
Schwartz v. Laundry and Linen Supply Drivers' Union Local 187, 339 Pa. 353, 14 A. 2d 438 (1940) ..... 36, 37
Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911) ..... 34
Steele v. Drummond, 275 U. S. 199 (1972) ..... 20
United States v. Cruikshank, 92 U. S. 542 (1875) ..... 20
United States v. Griffith, 334 U. S. 100 (1948) ..... 32
United States v. Topco Assoc., 405 U. S. 596 (1972) ..... 32
United States ex rel. Robinson v. Bar Association of District of Columbia, 197 F. 2d 408 (D. C. Cir. 1952) ..... 22
Weiner v. Hospital Service Plan of the Lehigh Valley, 13 D. & C. 2d 689 (C. P .Lehigh 1957), aff'd per curiam 187 Pa. Super. 244, 144 A. 2d 575 (1958) ..... 24
Wilson v. Albuquerque Board of Realtors, 82 N. M. 717, 487 P. 2d 145 (1971) ..... 40

## TABLE OF CITATIONS (Continued).

**Constitution:**


| | Page |
|---|---|
| U. S. Constitution amend. I | 2, 4, 14, 30 |
| U. S. Constitution amend. V | 2, 4, 14, 19 |
| U. S. Constitution amend. XIV, Sec. 1 | 2, 4, 14, 19, 30 |


**Miscellaneous:**


| | |
|---|---|
| 89 A. L. R. 2d 964 (1963) | 21 |
| Austin, "Real Estate Boards and Multiple Listing Systems as Restraints of Trade", 70 Colum. L. Rev. 1325 (1970) | 15 |
| Fried, "Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test," 76 Harv. L. Rev. 755 (1963) | 30 |
| Note, "Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983 (1962-3) | 30 |
| 25 U. S. C. 1257(3) | 2 |

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OCTOBER TERM, 1973.

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No.

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MAIN LINE BOARD OF REALTORS, ET AL.,
*Petitioners,*

*v.*

MARGARET HILL COLLINS AND SUBURBAN FAIR HOUSING, INC.
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT.

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Main Line Board of Realtors, et al., Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania, Eastern District, entered in the above cause on May 8, 1973.

## OPINIONS BELOW.

This is a Petition for Writ of Certiorari from the Opinion of the Supreme Court of Pennsylvania reversing a unanimous court en banc [three Judges] opinion, affirming the Adjudication of the Chancellor in and for the Court of Common Pleas of Montgomery County, Pennsylvania. The decision of the Supreme Court of Pennsylvania, Eastern District [Manderino, J.] was rendered by a divided court [4-3 decision] with Mr. Chief Justice Jones filing a dissenting opinion, in which Mr. Justice O'Brien and Mr. Justice Roberts joined. Mr. Justice Eagen concurred in the result and Mr. Justice Pomeroy filed a concurring opinion. The majority, dissenting, and concurring opinions of the Supreme Court of Pennsylvania, Eastern District, are reprinted in the Appendix and appear as A, B, and C respectively. The opinion is reported in — Pa. —, 304 A. 2d 493 (1973). The unanimous opinion of the court en banc [3 Judges] of Montgomery County, Pennsylvania, affirming the Adjudication of the Chancellor (not reported) is reprinted as Appendix D. The Adjudication of the Chancellor of the Court of Common Pleas of Montgomery County, Pennsylvania, not reported, dismissing the Respondents Complaint in Equity is reprinted in Appendix E.

## JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered May 8, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3), by reason of abridgment of Petitioners' rights under the First, Fifth and Fourteenth Amendments of the United States Constitution.

## QUESTIONS PRESENTED FOR REVIEW.

1. Does the Pennsylvania Supreme Court decision ordering the Main Line Board of Realtors, a non-profit corporation, either to (1) admit all other licensed real estate brokers into immediate membership, or (2) make the Multiple Listing Service of the Main Line Board of Realtors available to all non-member licensed brokers deprive each board member of his property in violation of the Fifth and Fourteenth Amendments?

2. Does the Pennsylvania Supreme Court decision ordering the Main Line Board of Realtors, a non-profit corporation, either to (1) admit all other licensed real estate brokers into immediate membership, or (2) make the Multiple Listing Service of the Main Line Board of Realtors available to all non-member licensed brokers violate each board member's Constitutional Fifth and Fourteenth Amendment rights of contractual freedom by involuntarily compelling him to enter into a contractual relationship involving the performance of personal services and the division of commissions?

3. Does the Pennsylvania Supreme Court decision ordering the Main Line Board of Realtors, a non-profit corporation, either to (1) admit all other licensed real estate brokers into immediate membership, or (2) make the Multiple Listing Service of the Main Line Board of Realtors available to non-member licensed brokers violate each board member's Constitutional right of association guaranteed by the First Amendment, applicable to the states by the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

## STATUTES INVOLVED.

### U. S. Constitution and Its Amendments.

*U. S. Const. amend. I.*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*U. S. Const. amend. V.*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*U. S. Const. amend. XIV Sec. 1.*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE.

This is a Petition for a Writ of Certiorari from the decision of the Supreme Court of Pennsylvania reversing a unanimous court en banc (three Judges) opinion affirming the Adjudication of the Chancellor in and for the Court of Common Pleas of Montgomery County, Pennsylvania. The decision of the Supreme Court was rendered by a divided court (4-3 decision) with Mr. Chief Justice Jones filing a dissenting opinion in which Mr. Justice O'Brien and Mr. Justice Roberts joined. Mr. Justice Eagen concurred in the result and Mr. Justice Pomeroy filed a concurring opinion. The Constitutional issue raised is the violation of the Petitioners' Constitutional rights under the First, Fifth and Fourteenth Amendments.

Respondent, Margaret Collins, hereinafter referred to as "Collins", a real estate broker licensed under the Pennsylvania Real Estate Commission, is vice president and primary broker of Suburban Fair Housing, Inc., a corporation organized and existing under the laws of the State of Pennsylvania, and engaged in the business of real estate brokerage in the areas of Delaware, Bucks, Montgomery and Eastern Montgomery Counties (N. T. 192a). Its principal place of business is located at 53 Cricket Avenue, Ardmore, Montgomery County, Pennsylvania. Hereinafter the corporate Respondent shall be referred to as "Suburban".

Petitioner, Main Line Board of Realtors, hereinafter referred to as "MLBR", is a non-profit corporation organized and existing under the laws of the State of Pennsylvania, with its office at 770 Lancaster Avenue, Bryn Mawr, Montgomery County, Pennsylvania. Its corporate purpose is to "advance, promote and protect the real estate business as a profession for the mutual benefit and interest of its members and the public, their clients"

(Exhibit "A", attached to Respondent's Complaint, N. T. 14a). The other Petitioners above-named are officers and members of this non-profit corporation.

MLBR was granted a charter by the National Association of Real Estate Boards on February 17, 1941, with its jurisdiction being limited to the "Townships of Lower Merion, Upper Merion (south of old Route 23) in Montgomery County, and Township of Radnor in Delaware County" (N. T. 756a). Thus the geographic and population area over which the MLBR has jurisdiction encompasses two and one-half townships, while the corresponding area in which Respondents are engaged in business include three entire counties comprising approximately 150 townships and boroughs.

The corporate Petitioner promulgated By-Laws to facilitate the internal functioning of the organization, including one pertaining to the admission of new members into the organization. Article IV, Membership specifically provides as follows:

"Section 1. APPLICATIONS

(a) Applications for membership shall be submitted in writing to the Administrative Secretary, and shall be proposed and seconded by at least two (2) Active Broker Members (not a member of the Membership Committee) . . .

(b) . . . .

(c) The Administrative Secretary, upon receipt of application for proposed membership, shall forward same to the Chairman of the Membership Committee . . .

(d) . . . .

(e) Upon receipt of an application or applications for membership in the Active Brokers or

> Salesmans Division of the Membership Committee—within thirty (30) days of receipt of such application or applications—shall call a meeting of the Membership Committee, at which applicant or applicants shall be notified to appear to submit to an examination . . .

Section 2. ELECTION

> All applicants for membership shall be submitted by the Chairman of the Membership Committee to the Board of Directors at their next scheduled meeting following the meeting of the Membership Committee. Each applicant shall be submitted with the recommendations and the findings of the Membership Committee. Each applicant will then be voted upon by the Board of Directors for admission to membership. Two-thirds affirmative vote of a quorum is required for acceptance. The Chairman of the Membership Committee shall then advise the Administrative Secretary of the new members for purposes of publication and shall also advise in writing all those elected. The Secretary of the Board shall notify all those applicants who are rejected." (N. T. 759a).

Further, Article III, Section 2. ELIGIBILITY FOR MEMBERSHIP, specifies the residency requirement can be waived if the applicant's "honesty, integrity, ethics, credit, etc., can be satisfactorily determined" (N. T. 757a). These standards, both clear and reasonable, are to be considered in accepting or rejecting an applicant for membership. In addition, the Code of Ethics of the National Association of Real Estate Boards was incorporated into the By-Laws of MLBR.

On July 1, 1964, the membership established a Multiple Listing Service, complete with Rules and Regulations under which most properties listed as "exclusive right" with individual members could be sold by other members of MLBR. There was nothing to force sellers into such listings, nor anything to state that all listings meeting the specific requirements had to be included. To the contrary, listing was discretionary with the individual broker and there was no regulation imposing an obligation on the membership to refuse cooperation with non-members; in fact such cooperation has been encouraged as witnessed by past occurrences (N. T. 308a, 318a, 325a, 338a).

Respondents in the years 1966, 1967, and 1968, applied for membership in the MLBR, and were on each occasion rejected (N. T. 702a, 704a). Both were proposed and seconded for membership by members of the corporate Petitioner, and on the latter two occasions complied with the technical requirements of the By-Laws. The Membership Committee in all three instances recommended the applications be denied, which recommendation was unanimously confirmed by Petitioner's Board of Directors in the first two instances, and by a substantial majority of the Board of Directors on the third occasion (N. T. 121a-125a, 440a, 499a). There is no allegation that the procedures employed in rendering these decisions violated the By-Laws of MLBR, or that Collins and Suburban were denied the opportunity to appear and present testimony on their own behalf.

Subsequent to the rejection of the first application, the matter was discussed informally with Collins and the reasons for the rejections were made known to her. They included the employment of part-time real estate salesmen (contrary to the By-Laws of MLBR); facts demonstrating that Wilbur Lew, an employee of Suburban, had acted contrary to the Petitioner's Code of Ethics in a co-operative sale situation; and written complaints about the indi-

vidual Respondent's own ethics and techniques employed in real estate transactions (N. T. 72a, 315a, 428a).

On the occasion of the rejection of their second application for membership, Respondents were given formal notice as to the reasons for such rejection. A formal statement was read to Collins by the President of MLBR, and the document was admitted into evidence at trial (N. T. 802a-803a). A review of that document cites five instances in which Respondent's conduct was objected to as being improper and unethical. The gravamen of these complaints involves the false accusations of discriminatory conduct which Respondent directed against members of the MLBR, without valid reason or justification. Despite the groundless nature of the charges, her fellow realtors suffered unjust criticism and injury, both financially and to their reputations.

The most blatant example of this type of conduct involved the filing of charges by a client of Collins, under her direction, against Stringer-Sellers Real Estate agency with the Pennsylvania Human Relations Commission on September 2, 1965. Stringer-Sellers had listed premises at No. 230 Lee Circle, Bryn Mawr, Pennsylvania for sale, and later for rent, with the multiple listing service. On September 2, 1965, at 10:30 A. M., a written lease was executed wherein the property was rented to a Villanova professor for a term of four months at a monthly rental of $175.00. At approximately 2:00 P. M. on the same date, Collins entered the Stringer-Sellers office and demanded that the secretary produce a key so that she could show a prospective purchaser the aforementioned premises. The secretary, being the only person in the office, refused, pursuant to instructions, and then informed Collins that the property had been leased that morning. At this point Respondent created a scene in the office of Stringer-Sellers, lost control

of her temper and berated the secretary until she obtained the key to the premises.

The following day Sellers informed Collins of the existence of the lease, after which she and her client filed a complaint with the Pennsylvania Human Relations Commission alleging discrimination. Collins did this without contacting the Lessee or the property owners to verify the facts, apparently without checking the Main Line Times, a local newspaper carrying real estate advertisements, wherein it appeared on August 12, 1965 and August 26, 1965, that the property was listed for rent, and without bothering to ascertain that seven black families currently resided in the area. A two-day hearing in the matter was conducted, after which the complaint was dismissed with the following comments: ". . . the clear and convincing testimony submitted by the respondents and their witnesses leave little doubt that the complainant's offer to purchase was not refused because of her race, but because of other valid reasons, having nothing to do with race." (N. T. 726a-727a).

The rejection of the third application reiterated the reasons stated previously, and also noted a list of letters from fellow members of MLBR questioning professional standards in handling real estate transactions and her ethics in general. One broker stated he had two customers who had previously contacted Collins but were dissatisfied with her because she was too "pushy" (N. T. 539a). Another incident cited involved Lawrence Flick, Esquire, an attorney and Comptroller of Montgomery County, who complained about her eagerness to effect a sale when it was in the better interests of the sellers to rent, and her subsequent conduct in preparing a deed and insisting his (Flick's) clients sign it without the presence of a notary. A notary is required under Pennsylvania law to acknowledge the oath of the parties signing said document, and the fact

that the execution occurred in his presence. Such conduct, had it been accepted, would have violated the law of Pennsylvania and rendered the deed invalid, and been contrary to legal advice.

Also introduced at trial was the fact that Respondent's reputation as a real estate broker was exteremely poor (N. T. 394a, 404a, 419a, 447, 467a, 570), and a primary reason for her rejection. These apprehensions were well founded as was proven subsequent to her third rejection. At that time Collins, who was cooperating with a member of the MLBR in selling a house, signed the name of the cooperating broker to an Agreement of Sale without said broker's authorization or knowledge (N. T. 335a, 414a-415a). Although after the fact, this conduct supports the finding of the Chancellor shared by the members of MLBR that the Respondents do not possess the ethics and integrity shared by the other members of the Multiple Listing Service. Such a lack of confidence in any single member could ultimately destroy the entire concept of cooperation among brokers to effect real estate sales.

Respondents' major concern, however, is not membership in the MLBR *per se*, but the alleged denial of access to the Multiple Listing Service organized and established by the Petitioners. This alleged refusal is the basis for their position that Petitioners have created an unreasonable restraint of trade. While there is little doubt, and the Chancellor found, that the Multiple Listing Service is an advantageous tool in the operation of the real estate business, it is by no stretch of the imagination essential to the economic survival of a realtor on the Main Line (N. T. 412a, 419a, 448a, 467a, 542a, 571a, 597a, 599a, Findings of Fact).

An examination of the record developed in the Lower Court clearly defines the extent and nature of the Multiple Listing Service and supports this conclusion. Firstly, there is a vast area of Montgomy and Delaware Counties and the

entire County of Bucks which is not encompassed by the MLRB or the Multiple Listing Service, but is included within the area of business activities of Respondents. Accordingly, these areas are in no way hindered by the existence of a Multiple Listing Service elsewhere. Secondly, there has been no effort, concerted or otherwise, to destroy competition in the real estate area. To the contrary, on two of the three occasions when the Respondents were rejected for membership, other individuals were admitted to the organization as members; on one occasion six of the eight applicants were actually accepted; on at least the last two occasions, however, one other applicant was also refused admission (N. T. 122a, 123a, 446a).

The MLBR operates a multiple listing service under which notice of exclusive listings of a member broker are circularized among all other members of the association, although all members of MLBR are not members of this service (N. T. 130a-131a). While the direct use of the multiple listing service is limited to members of the MLBR, there is no rule, written or informal, which prohibits members of the corporation from cooperating with non-members in the sale of real estate, or forbids members from informing non-members of those properties which are included in the lists of the service. Indeed, the testimony presented at the trial demonstrated that members have cooperated with Respondents and other non-members on numerous occasions, and were even encouraged to cooperate with non-members. Collins admitted that she never asked any member of MLBR to see the multiple lists, even though members had previously been cooperative and friendly with her (N. T. 364a-365a).

Although several brokers estimated the percentage of their sales business attributed to the Multiple Listing Service, Jack Wagner, Secretary of MLBR introduced a factual analysis of the Multiple Listing Service for the

years 1965 through 1969 for all real estate sales negotiated by members of MLBR (N. T. 515a-522a, 801a). The ultimate result demonstrated that cooperative sales where properties were listed by one broker and sold by another member broker never exceeded 42% of the total dollar volume of sales negotiated by members of MLBR in a single year; more specifically these percentages were 39%—1965; 33%—1967; 36.8%—1968; 42%—1969. Another portion of testimony involved a random selection of real estate listings appearing in the Main Line Times on July 17, 1969. A breakdown revealed that only 26% of the properties were under multiple listing, while 74% were not (N. T. 548a-549a, 800a). These figures, which were not disputed, clearly justified the Chancellor's finding that the multiple listing service was not essential to economic success in the business of buying and selling real estate in the territory of MLBR.

## REASONS WHY CERTIORARI SHOULD BE ALLOWED.

### ARGUMENT.

**1. The Pennsylvania Supreme Court Directive to the Main Line Board of Realtors to Admit Non-Member Licensed Brokers to Its Multiple Listing Service Is a Deprivation of Property and an Unwarranted Interference With the Contractual Freedoms Guaranteed in the Fifth and Fourteenth Amendments.**

The Supreme Court of Pennsylvania Eastern District has decided an important question of law which has not been, but should be, decided by this court, viz., whether a voluntary non-profit corporation comprised of real estate brokers can be ordered to admit all other licensed real estate brokers into immediate membership in the said organization, thereby allowing them participation in the organization's multiple listing service, or in the alternative can be ordered to make available to all non-member brokers the multiple listing service of the said corporation because said multiple listing service constitutes an unreasonable restraint of trade, per se, or whether such a decision denies to the corporation and its members their associational right with respect to the organization and each other, and deprives the corporation and its members of their property in the multiple listing service, without due process of law; all of which is contrary to the First and Fifth Amendments to the United States Constitution, as made applicable to the States through the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

An initial consideration must be given to the purpose and function of the multiple listing service and its impact upon the real estate market. Such an analysis, however,

must be made in conjunction with the purpose of anti-trust legislation and unfair competition laws which is to protect the public by healthy competition, rather than primarily protect individual plaintiffs. *Riggall v. Washington County Medical Society,* 249 F. 2d 266 (8th Cir. 1957), and *Elizabeth Hospital Inc. v. Richardson,* 167 F. Supp. 155 (W. D. Ark. 1958), aff'd 269 F. 2d 167 (8th Cir. 1959), cert. den. 361 U. S. 884 (1959).

Accordingly, the nature of real estate and its imperfections must be viewed in light of the announced policy of promoting the public interest. The great disadvantage inherent in land is its total lack of mobility. This problem has become more apparent as increasing numbers of Americans (36 million people) move to new residences every single year. Austin, "Real Estate Boards and Multiple Listing Systems as Restraints of Trade", 70 Colum. L. Rev. 1325, 1334 (1970). Viewed in light of the immobility of land as contrasted to the increasing mobility of the population, the multiple listing service has been an unexpected blessing. The broker has immediate access to a larger number of listings while exposing his own listings to a broader market, thus he is able to adjust supply and demand, span the information and communication gap, and even engender a more realistic price structure. The impact on the sales transaction is likewise important because it gives the seller the benefit of both an exclusive and a closed listing and guarantees the purchaser a wider selection of opportunities than would be available from a single office, but with a substantial saving in time and effort. Through the multiple listing service the sale of land is in many ways analogous to the trade exchange in commercial transactions. See Austin, "Real Estate Boards and Multiple Listing Systems as Restraints of Trade", 70 Colum. L. Rev. 1325 (1970).

Even the courts have noted the great advantages introduced by the concept of multiple listing.

> "There is good in the multiple listing system. It provides an effective method for selling and buying properties. The seller benefits because his property is exposed in a number of offices, hence reaches a wider market in a shorter period of time. It is also useful and convenient to the prospective buyer who is seeking a house that will suit his needs and purse. From one selling agent he can learn of many of the properties for sale in the area. In effect, the multiple listing service operates as an exchange for the sale of real estate. The multiple listing system can potentially stimulate competition in the real estate field . . ." *Grillo v. Board of Realtors of Plainfield Area,* 91 N. J. Super. 202, 219 A. 2d 635, 644 (1966).

At the heart of the multiple listing service is the right of individual brokers to *select and associate* with those other individuals with whom they desire to bind themselves in a *contractual* manner. Accordingly, any decision interfering with these rights must be closely examined since the effect upon the transferability of property might be negatively affected. Rather than associate with brokers who would destroy one's business reputation, current member brokers might terminate the multiple listing service totally. Such a position would contradict the very purpose of the anti-trust and unfair competition laws upon which this decision was allegedly based.

**2. Compliance With the Court Directive Will Result in an Unwarranted Interference With the Contractual Freedoms of Each Member in That Each Member Is Ordered to Contract With Others in a Multiple Listing Agreement Which Involves Performance of Services and Division of Commissions.**

The principal issue raised by this case is the right of certain real estate brokers to contract, among themselves, for their mutual benefit, and to select those parties with whom they choose to associate and contract. The by-laws and charter of a non-profit corporation are, in fact, a contract among its members. In *Gordon v. Tomei,* 144 Pa. Super. 499, 457, 19 A. 2d 588 (1941), the Superior Court of Pennsylvania held:

> "The by-laws of a corporation has been called 'its private statutes for its own government, unless contrary to the laws of the land.' *Bagley v. Reno Oil Co.,* 201 Pa. 78, at page 80, 50A, 760 at page 761. Those of an unincorporated association have been said to be the contract of association of its members. *Leatherman, et al. v. Wolf, et al.,* 240 Pa. 557, 564, 88A, 17. In *Manning v. Klein, et al.,* 1 Pa. Superior Ct. 210 at page 216, this court said: 'It is undoubtedly true that as a general proposition that the constitution and by-laws of a voluntary association constitute the compact which binds its members together and the law by which they are governed.' "

The contract is "made" when one becomes a member, and such a contract, like any other contract, imparts certain rights and obligations in the parties to that contract. In *Blenko v. Schmeltz,* 362 Pa. 365, 371-72, 67 A. 2d 99 (1949), the Supreme Court of Pennsylvania reasoned:

> "The right of property vested in members of unincorporated associations rests on the agreement of the associates and may vary with the nature and purposes of the associations. The contract creates the right and even the state may not impair the obligation of the contract."

Although much of the reasoning and, therefore, the law regarding the contractual rights and duties of members of private organizations emanates from "expulsion" cases like the *Blenko* case, the general rules of the law of contracts, as set forth in those cases are equally applicable to the other rights which the contract of membership confers upon each party. All the By-Laws and the Charter of the Main Line Board of Realtors were introduced into evidence in this case, and therefore, the contract among the membership is before this Honorable Court. Among the rights granted to the parties to this contract is the right to select additional qualified applicants and make them parties to the contract by electing them to membership, in accordance with the procedures set down in the By-Laws. This right to elect new members in strict accordance with Article IV of the by-laws is a crucial right belonging to each existing member because the admission of each new member "dilutes" the rights of every previously existing member, and because each new and existing member has the power to seriously affect the ability of the other parties to earn a living. Therefore, each member has the right to demand that the Board of Directors and Membership Committee of Petitioner perform their duties in passing upon applications for membership.

The potential effect of new members upon existing members in the Board is obvious. Each new subscriber to the multiple listing has a *contractual right* to a share in a commission if he produces a buyer for a property upon

which another member has obtained an exclusive listing contract. Thus, each existing member agrees to "share" his *exclusive* listing contracts. Needless to say, a professional realtor, who has built up a good reputation over years of practice—as have the many members of the Main Line Board of Realtors—is entitled to this Court's protection of his right to select those with whom he will share his exclusive listing contracts. Undesirable or unprofessional conduct by persons entitled to share such contracts can seriously harm the reputation, good will and the very business which a member has worked to build. Nowhere is the old adage that "a man is judged by the company he keeps" more frequently applied than by clients who are about to select an advisor or enter into an important relationship.

The courts of the United States, most notably this Honorable Court, have been vigilant in their protection of this contractual freedom. This Court has made it abundantly clear that contractual freedom is within the purview of the Fifth and Fourteenth Amendments. *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923); *Nebbia v. New York*, 291 U. S. 502, 523 (1934); *Adair v. United States*, 208 U. S. 161 (1908). This Court, in declaring the Industrial Relations Act of Kansas unconstitutional, said in *Chas. Wolff Packing Company v. The Court of Industrial Relations of the State of Kansas*, 267 U. S. 552, 566 (1925):

> "These qualifications do not change the essence of the act. It curtails the right of the employer on the one hand, and the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guarantee of the due process clause of the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U. S. 390 (1923)."

This Court has further condemned governmental activity which orders parties into a contractual relationship, such as that ordered by the Pennsylvania Supreme Court to the Petitioners herein. In declaring Section 10 of a Congressional Statute, 30 Stat. 424 passed in 1898, unconstitutional, the Court therein said:

> ". . . the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, *it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another or to compel any person, against his will, to perform personal service for another.*" *Adair v. United States*, 208 U. S. 161, 174 (1908). (Emphasis added.)

The Court further stated in *Steele v. Drumond*, 275 U. S. 199 (1927) in deciding upon whether a contract was against public policy, at page 205: "*And it is a matter of great public concern that freedom of contract be not lightly interferred with. Baltimore & Ohio Southwestern Ry. v. Voight*, 176 U. S. 489, 505."

The Fifth Amendment's constitutional guarantees are protected from state interference by the Fourteenth Amendment. *United States v. Cruikshank*, 92 U. S. 542 (1875); *Bloom v. Illinois*, 391 U. S. 194 (1968); *Bolling v. Sharpe*, 347 U. S. 497 (1954).

Moreover, since the admission of new members into the Board causes a dilution of the interest of the existing members, the admission of a new member is, in a very real sense, a deprivation of the rights of existing members. By setting up a procedure pursuant to which new members may be

admitted, the existing parties to the contract have prescribed the manner in which their rights might lawfully be diluted. Respondents in this action seek to dilute the rights of the members of MLBR in a manner which is contrary to the specific terms of the contract.

Article IV of the By-Laws is the part of the contract applicable to new membership, and it provides, in pertinent part, that applications for membership shall only be accepted after investigation by the Membership Committee, examination of the applicant, and submission of a report to the Board of Directors, which report shall contain "the recommendations and findings of the Membership Committee". The contract goes on to provide:

> "Each applicant will then be voted upon by the Board of Directors for admission to membership. Two-thirds affirmative vote of a quorum is required for acceptance."

In each of the three applications submitted by the Respondents, the procedures prescribed by the rules were scrupulously followed. Respondents appeared before the Membership Committee, but the reports in every case were unfavorable, because of the unprofessional and disruptive conduct of Collins which was documented at trial. Respondents failed to receive the necessary two-thirds affirmative vote required for acceptance under the by-laws.

The general law with respect to applications such as the Respondents is well stated by the author of the annotation entitled "*Compelling Admission to the Membership in a Professional Association or Society*", which appears in 89 A. L. R. 2d 964, 966 (1963), wherein the author writes:

> "Although the Courts will compel reinstatement of a member who has been arbitrarily or wrongfully expelled, the general rule is that the Courts cannot com-

pel admission of an individual into a voluntary association, since membership is a privilege and not a right, and even if a person's application is arbitrarily refused, he is without legal remedy. It appears that the weight of authority favors the application of the general rule with regard to compelling admission to professional societies or associations also."

The overwhelming weight of authority is that membership in a private organization is a privilege and a valuable right, and, therefore one who is not party to the contract of association cannot compel the existing parties to admit him. As recently as 1952, this rule was recognized and applied by the United States Court of Appeals for the District of Columbia in the case of *United States ex rel. Robinson v. Bar Association of District of Columbia*, 197 F. 2d 408 (D. C. Cir. 1952). In that case, Plaintiff charged that the Federal Bar Association was unlawfully excluding him because of his race and he asked the Court, inter alia, to order his admission to said association. In denying relief to the Plaintiff, the Court upheld his exclusion from membership and wrote, at page 410:

> "Without question, the Bar Association is a private corporation, and its policies and conduct remain those of its membership subject, of course, to those laws and regulations which pertain to the conduct of a corporation of its type."

The Court found that among the rights of the Bar Association membership was "free choice and its selection of members."

Many other jurisdictions have recognized and enforced the rule quoted above. For example, in *Kronen v. Pacific Coast Society of Orthodontists*, 46 Cal. Rptr. 808 (Ct. App. 1965), the Court refused to issue an injunction to compel

Plaintiff's admission into the Defendant association. In holding that the Plaintiff was properly rejected, the Court reasoned as follows:

> "As a general rule membership in a voluntary association is a privilege which may be granted or withheld by the association at its pleasure, not an enforceable right, and the Court will not interfere to compel an admission to membership no matter how arbitrary or unjust may be the rejection of the candidate." 46 Cal. Rptr. 808, 816-817.

In *Gremplar v. Multiple Listing Bureau,* 258 Md. 419, 266 A. 2d 1 (Ct. App. 1970) the court followed the above rule of law:

> "The expressed rule is that usually a private voluntary organization may accept or refuse members as it chooses, subject only to its own constitution, charter and by-laws. *Baltimore Co. Hosp., Inc. v. Md. Hosp.,* 234 Md. 427, 200 A. 2d 39 (1964); *Levin v. Sinai Hosp. of Balto.,* 186 Md. 174, 46 A. 2d 298 (1946)."

To the same effect are *Ross v. Ebert,* 275 Wis. 523, 82 N. W. 2d 315 (1957); *Medical Society of Mobile County v. Walker,* 245 Ala. 135, 16 So. 2d 321 (1944). This rule has been recognized and followed in Pennsylvania at least since the decision in *Kearns v. Howley,* 188 Pa. 116, 41 A. 273 (1898), wherein the Supreme Court of that State was confronted with the issue of the validity of an election to membership in a committee of a political party. The Court held that such a party was a private organization and should be governed by law applicable to private organizations. Although the conclusion may not obtain with respect to political parties today, the reasoning of the Court concerning private organizations is still valid, and it is sub-

mitted that such reasoning is the law of Pennsylvania. Quoting from the New York Court of Appeals, in *McKane v. Adams*, 123 N. Y. 609, 25 N. E. 1057 (Ct. App. 1890), the Court said at page 612:

> " 'Membership is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. So when, as by the plaintiff's own showing, the committee refused to admit him as a member or to confirm his election, he was remediless against that refusal. No rights of property or of person of plaintiff were affected, and no rights of citizenship were infringed upon.'
>
> We adopt this language as expressing our opinion in this case, without referring to and citing the many cases to which counsel on both sides have called our attention, for none of them is of such authority as to move us from our previous decisions."

This rule was recently followed in two more recent Pennsylvania cases. In *Kassab v. Medical Services Association of Pennylvania, Inc.*, 425 Pa. 630, 230 A. 2d 205 (1967), the Supreme Court affirmed the Court of Common Pleas of Delaware County and adopted the opinion of Judge Catania, as reported in 39 Pa. D. & C. 2d 723 (C. P. Delaware 1966). In that case, the Plaintiff, a qualified medical practitioner, refused to comply with the by-laws of the Defendant Association, and thus, his demand for an injunction compelling his admission was properly refused. And in *Weiner v. Hospital Service Plain of the Lehigh Valley*, 13 D. & C. 2d 689 (C. P. Lehigh, 1957), aff'd per cur. on the opinion of the lower court, 185 Pa. Super. 244, 144 A. 2d 575 (1958), it was held that Defendant could properly exclude Plaintiff from accreditation simply because he operated a dental hospital and Defendant had elected not to accredit dental hospitals.

Plaintiff's request for a mandatory injunction was denied, even though he may have suffered adverse economic effects as a result of Defendant's rejection.

It is submitted that the membership rights of existing Board members are entitled to the same protection from improper dilution as the courts have afforded with respect to explusion. In *Blenko v. Schmeltz, supra,* the Supreme Court of Pennsylvania, quoting with approval from *Metropolitan Base Ball Association v. Simmons,* 17 Phila. 419 (1884), held at page 420:

> " 'Now, membership of such an association, after it has been acquired in pursuance of constitution, is a matter which is in itself legal property even in an unincorporated association; the right of membership in such an association is recognized in the Courts of Pennsylvania as property, and no man can be deprived of it without having forfeited it by some act which was lawful and cause of forfeiture but without notes and trial.' "

It is submitted that if this Court were to order the Defendant to admit Plaintiffs to membership, such an order would be tantamount to destruction of the property and contractual rights of the existing membership of Petitioners *inter se,* and this Court certainly should not move to dilute those rights in this action unless Respondents can clearly demonstrate some superior right.

There are also many "expulsion" cases in which the membership rights of a member of a private organization are discussed. Obviously, if the Respondents in the instant case have any rights as licensed brokers in the Commonwealth, every broker-member of the Board possesses the same rights and, in addition, said members possess the rights conferred upon them by the contract to which they

are already parties. Respondents do not possess the latter rights. The rights of an existing member in an organization are well settled, and since the "rights" of an applicant should be no greater than the rights of a member who may have been excluded or may be threatened with expulsion, the law applicable to such exclusion situations will delineate the maximum possible rights of a party applying for membership.

Basically, the law is that if the proceedings for expulsion have been regular and in accordance with the contract, that is, the by-laws of the association, the member can be expelled and can lose all his rights. For example, in the case of *Anthony Wayne Terrace Housing Association v. Bedio,* 186 Pa. Super. 335, 142 A. 2d 482 (1958), the by-laws of a private association, in which the Defendant had a property interest, provided for expulsion after service of a complaint from a member and a hearing by the Board of Directors, if requested. The only issue raised was whether or not the Defendant had been served with a copy of the complaint against her, and the Trial Judge directed a verdict in favor of the Plaintiff because there was no evidence to sustain the finding of a single fact which would be a defense to the Plaintiff's claim; thus, the Court held that the Defendant's membership "was lawfully terminated in accordance with the Association's by-laws". The Pennsylvania Supreme Court has recognized and affirmed the rule that a private association may expel one of its members if the procedure is in acordance with their contract, the by-laws of the association. In *Berberian v. Lancaster Osteopathic Hospital Association,* 395 Pa. 257, 149 A. 2d 456 (1959), the Court ordered the Defendant to hold a hearing before expelling the Plaintiff, because the by-laws of the association so required. The Court did, however, recognize the right of the hospital to exclude the Plaintiff, for cause, in accord-

ance with its own by-laws, notwithstanding Plaintiff's complaint that his economic position and right to earn a livelihood would be destroyed. The court stated at page 263:

> "While there can be no doubt that the board of directors of the hospital has authority to deprive a physician of the privileges of the staff, it is equally clear that the board has agreed to follow certain specified procedures before determining whether to exercise its authority in the matter of a staff member's expulsion from the hospital. The procedures so approved by the board requires an 'adequate hearing and thorough investigation' by the executive committee of the general staff and an 'appeal with legal counsel, before a joint meeting' of the staff's executive committee and the hospital board of directors. When the board of directors approved the staff's by-laws, they became an integral part of the contractual relations between the hospital and the members of the staff."

It gave the above explanation after holding that:

> "The relationship between a hospital association and a member of the hospital staff is based on contract: (citing cases). Consequently in cases such as the present, the nature of the contractual relationship between the assailed staff members and the hospital association determines whether hearing on charges against the staff member is necessary before he can be discharged from the hospital staff because of such charges." 395 Pa. 257, 262, 149 A. 2d 456, 458 (1959)

The law of Pennsylvania is the same as the law in other jurisdictions throughout the country on this issue. While no Pennsylvania cases dealing with applications for membership in, or expulsion from, *real estate boards* has been discovered—with the exception of the Pittsburgh case

described in a latter portion of this brief—other jurisdictions have considered the matter of expulsion from real estate boards. For example, in *Bullard v. Austin Real Estate Board, Inc.*, 376 S. W. 2d 870 (Civ. App. Tex. 1964), the Court refused to enjoin the expulsion of a broker who had refused to comply with the award of an arbitration panel appointed by the board in a disputed commission case. The by-laws of the association provided for automatic expulsion if no appeal was taken within the regular channels of the board in such a matter. The Court of Civil Appeals upheld "the right of a private association to make rules of conduct involving its membership and its right to expel a member for failure to follow the rules". That Court relied on its decision in the *Bullard* case, when it decided *American Institute of Real Estate Appraisers v. Hawk,* 436 S. W. 2d 359 (Civ. App. Tex. 1968), wherein it enjoined the suspension of the Defendant because the plaintiff had not followed its own rules requiring a hearing. The Court did recognize, however, that "private associations have the right to remove those of their members who fail or refuse to abide by the association's rules and regulations". To the same effect is *Cunningham v. Burbank Board of Realtors,* 68 Cal. Rptr. 653 (Ct. App. 1968), wherein the Defendant was enjoined from expelling Plaintiff without a hearing as required by the association. See also *Hoey v. San Antonio Real Estate Board,* 297 S. W. 2d 214 (Civ. App. Tex. 1956), wherein the Court upheld the expulsion of a board member who refused to comply with the multiple listing service rules. The Plaintiff was expelled by the board after full hearing and full compliance with its own rules and regulations, but he complained to the courts on the basis that the rules which he admittedly violated were unjustly applied to him. In rejecting his claim and upholding his expulsion, the Court stated at page 217:

"To say that the courts may exercise the power of interpretation and administration reserved to the governing bodies of such organizations would plainly *subvert their contractual rights* to exercise such power of interpretation and administration." (Emphasis supplied.)

It is submitted that when the Pennsylvania Supreme Court ordered the admission of the Respondents into membership that action subverted the contractual rights of the other members of the MLBR without due process of law. What Respondents really seek is an order compelling Petitioners to enter into a contract with them. Thus, they contend the MLBR and its membership have a legal obligation to enter into such a contract. However, one of the most important attributes of a contractual relationship is mutuality of obligation, and surely Respondents would not contend or agree that the MLBR has the legal right to compel Collins and Suburban to become members of that organization.

Having determined the multiple listing service to be a property right, and the existence of a contractual right of association in non-profit corporations, Petitioners assert that the interpretation by the Supreme Court of Pennsylvania of the common law policy of Pennsylvania has been arbitrary and unreasonable, resulting in a loss of property by Petitioners without due process of law.

"Unreasonableness might be found not only in a determination that an association's means bore no rational relation to valid ends, but also in a failure of the association to adopt alternative means was harmful to non-members. But in making such inquiries, *the court may be unduly interfering with the group's autonomy by substituting judicial judgment*

> *for that of the association—often in an area in which the competence of the court does not equal that of the association.*" (Italics supplied.) Note, *Judicial Control of Actions of Private Associations,* 76 Harv. L. Rev. 983, 1053 (1962-63).

State action of this sort is prohibited by the constitutional guarantees just cited. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.,* 391 U. S. 308 (1968); *American Federation of Labor v. Swing,* 312 U. S. 321 (1941).

The concept of an associational right protected by constitutional safeguards arose in *N. A. A. C. P. v. Alabama ex rel. Patterson,* 357 U. S. 449 (1958) in which this Court held the First Amendment and Due Process Clause of the Fourteenth Amendment guarantee to individuals the right of free association. This interest, however, is usually coupled with some other constitutional right (discussion in the case just mentioned). In the instant matter, judicial intervention is challenged on constitutional grounds as an interference with the protected sphere within which groups are free to act as they wish, in particular to choose their own members. Fried, "Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test," 76 Harv. L. Rev. 755 (1963). This interest is complimented by the additional question of a property right in the multiple listing system which is also constitutionally protected. Note, "Judicial Control of Actions of Private Associations," 76 Harv. L. Rev. 983 (1962-63).

To determine whether the Supreme Court of Pennsylvania was arbitrary and unconstitutional in its decision, one must examine the facts of the situation and see if judicial intervention was warranted because a restraint *per se* existed, and if the remedy provided was reasonable under the circumstances.

**3. The Multiple Listing System of the Main Line Board of Realtors Is Neither a Monopoly Nor an Unreasonable Restraint of Trade Per Se.**

Although cases under the Sherman Act are not controlling in this area under State jurisdiction, those cases are highly persuasive because it is recognized that the Sherman Act incorporates the common law restraint of trade principles. *Gremplar v. Multiple Listing Bureau of Hartford County,* 258 Md. 219, 266 A. 2d 1 (Ct. App. 1970); *Grillo v. Board of Realtors of Plainfield Area,* 91 N. J. Super. 202, 219 A. 2d 635 (1966). Since the common law was the basis upon which the Pennsylvania Supreme Court rested its decision, the Petitioners contend that the federal cases on the Sherman Act, which embrace the common law, are controlling herein.

In the first place, it should be obvious that associations in which members of a certain profession or calling join together for the purpose of sharing facilities and information are not, in and of themselves, unlawful or illegal restraints upon the practice of the given profession or trade, either by statute or at common law. It is also obvious that all trade associations attempt to confer some benefits upon their members which non-members do not enjoy.

In several decisions, the United States Supreme Court has enunciated what is known as the "per se" test for determining violations of the Sherman Act. In *Northern Pacific R. Co. v. United States,* 356 U. S. 1, 5 (1958) Mr. Justice Black stated the need for per se rules:

> "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have

caused or the business excuse for their use." (Emphasis added.)

The Court in *United States v. Griffith*, 384 U. S. 100 (1948), said that it is the existence of monopoly power coupled with the intent to use it for anti-competitive purposes, or with inevitable anticompetitive effects that establishes the offense of monopolization. The Multiple Listing Service as practiced by the Main Line Board of Realtors in no way falls within the purview of the above guidelines. The Service is not deemed to have inevitable anticompetitive effects. There is no intent to use it for anti-competitive effects, nor has the Respondent ever proved an unlawful intent. A multiple listing service encourages competition, promotes a wider market, and benefits the public as buyers and sellers of real estate. Such was the opinion of the Maryland Court of Appeals in *Gremplar v. Multiple Listing Board, supra,* when the Court there held the multiple listing service valid and not in restraint of trade.

The summary of the development of the rule of reason analysis is articulately stated by Mr. Justice Marshall in the United States Supreme Court decision in *United States v. Topco Assoc.*, 405 U. S. 596 (1972). Mr. Justice Marshall stated the Court's interpretation of Section 1 of the Sherman Act at pages 606-607:

"On its face, Sec. 1 of the Sherman Act appears to bar any combination of entrepreneurs so long as it is in restraint of trade. Theoretically, all manufacturers, distributors, merchants, sellers, and buyers could be considered as potential competitors with each other. Were Sec. 1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it. *Chicago Board of Trade*, 246 U. S. 231, 238 (1918)

(Brandeis, J.). The history underlying the formulation of the anti-trust laws led this Court to conclude, however, that Congress did not intend to prohibit all contracts, nor even all contracts that might in some insignificant degree or attenuated sense restrain trade or competition. In view of the narrowest possible reading of Sec. 1, the Court adopted a rule of reason analysis for determining whether most business combinations or contracts violate the prohibitions of the Sherman Act. *Standard Oil Co. v. United States,* 221 U. S. 1 (1911). An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and the reasons for its adoption. *Chicago Board of Trade v. United States,* supra, at 238."

The multiple listing service does not restrain trade or deprive any non-member broker from engaging profitably in the profession. The Multiple Listing Service was formed by the contractual agreement of Main Line Board of Real Estate members, whereby they agreed to service each others' clients and divide the commissions. The purpose of the agreement was to provide a better service and a wider market for their clients. There was no intent to restrain trade.

The Respondents have not proved that they were wrongfully excluded from membership in the corporate Petitioner, nor have they proved that the existence of the MLBR and/or its multiple listing service restricts, or tends to restrict, competition, nor do they allege that the restraint of trade which arises from the agreement among the members of the MLBR to operate a multiple listing service is "unreasonable". It is interesting to note that Respondent's Complaint does not even state a cause of action under

the Sherman Act or any other federal anti-trust law. Even under the Sherman Act, in order for a contract or combination to be illegal, that contract or combination must "unreasonably" restrain trade. *Standard Oil Co. v. United States*, 221 U. S. 1 (1911). As was said by Mr. Justice Brandeis in the *Board of Trade* case, 246 U. S. 231 (1918), every agreement is, in a sense, in restraint of trade. The test is whether or not the limitation or restraint is reasonable.

Our Courts have set down some criteria for determining whether or not professional associations or combinations are violative of the Federal Anti-Trust laws. For example, in the famous *Associated Press v. United States*, 326 U. S. 1 (1944), the Supreme Court of the United States affirmed a holding of the lower court to the effect that certain by-laws of the association known as the Associated Press were invalid because they were designed to allow members to block competitors from membership in the association and, thus, from obtaining news for publication. The Court held, however, that the association could and should be allowed to adopt and enforce by-laws which might "restrain admission" provided that the competitive position of an applicant "shall not be taken into consideration in passing upon its application".

To the same effect is the case of *Deesen v. Professional Golfer's Association of America*, 358 F. 2d 165 (9th Cir. 1966). This case involved an action by a professional golfer against the PGA to compel the PGA to allow him to play in professional tournaments. The PGA, an association of professional golfers, controlled all the professional tournaments within the United States and made the rules for participation in such tournaments. The Plaintiff had been excluded because he did not meet the qualifications set up by the PGA under its rules. The Court held that *neither the rules of the PGA, nor their application to the*

*Plaintiff* were contrary to the Sherman Act. The Court held, at page 170:

> "The basic purpose of PGA in requiring persons who seek approved tournament standing to meet certain standards and obtain committee approval appears to be a reasonable one, insofar as the evidence before us indicates. That purpose is to insure that professional golf tournaments are not bogged down with great numbers of players with inferior ability. The purpose is thus not to destroy competition but to foster it by maintaining a high quality of competition.
>
> "The means which PGA has chosen to accomplish this purpose also appears to be reasonable insofar as this record reveals, having in view the national scope of the activity and the practical problems which had to be met."

The Court went on to say, at page 172:

> "PGA is entitled to adopt reasonable measures for holding the tournaments to a manageable number. It was required to treat Deesen as well as it treated others in the same category but it was not compelled to give him special treatment because he did not wish to accept PGA tournament entry rules and regulations."

The instant case is quite similar to the PGA case. In both situations, the parties seek admission to a professional association which conducts an activity in which they would like to participate. The Court in the PGA case held that the by-laws of the association were not unreasonably restrictive of trade or tending to a monopoly because they were reasonable in and of themselves, and their application to plaintiff was not unreasonable. The rules and regulations of the Petitioner, Main Line Board of Realtors, are, in and of themselves, reasonable. They were made in an

effort to advance, promote and protect the real estate business as a profession for the mutual benefit and interest of its members and the public. Members are required to abide by the Code of Ethics adopted by the Board and they are not to conduct themselves so as to discredit the Board or the Profession. Applicants are judged by the same standards as are members of the Board. Respondents have not proved that their application to Petitioners was rejected unreasonably, and in violation of proper procedures and due process. Accordingly, Respondents have no standing to complain about the manner of their rejection, only the effect thereof.

The authorities cited by the Majority Opinion as a basis for their position were *Schwartz v. Laundry & Linen Supply Drivers' Union Local 187,* 339 Pa. 353, 14 A. 2d 438 (1940), and *Grillo v. The Board of Realtors of the Plainfield Area,* 219 A. 2d 635 (N. J. Super. 1966). The *Schwartz* case has never been followed, and would most certainly be discarded today. It involved a dispute between a union and certain non-union independents known as "bob tails" to whom employers with closed-shop contracts were sub-contracting or "contracting out" work. Although the Court held that the employers could not be prevented from "contracting out" or sub-contracting the same work which its own driver-union employees were performing, it is well established now that the question of sub-contracting or "contracting out" is a proper subject to collective bargaining under the National Labor Relations Act, and a Union may enter into an agreement with an employer to prevent such contracting out or sub-contracting. Moreover, as Mr. Justice Maxey pointed out in his dissenting opinion, at pages 367-368:

> "The earlier doctrine that labor was a commodity in the sale of which there should be unrestrained competi-

tion and 'against which no one had a right to be protected', as an American court expressed it 69 years ago, has completely given way to the modern idea expressed in the Federal Clayton Act. This Act was described by Honorable John W. Davis, then (1912) a member of the House of Representatives, as 'an effort to crystallize into law the best opinions of the best courts' (48 Cong. Rec. 6421). This act, which became a law in 1914, provided that 'the labor of a human being is not a commodity or article of commerce'. Practically all of the American states have in their statutes and judicial decisions adopted the same view, to wit, that labor is not a commodity."

Accordingly, labor is not subject to the law against combination in restraint of trade, and the "precedent" of the *Schwartz* case is without value. The only possible theory upon which the result in the *Schwartz* case could be sustained today is one of "intentional interference with existing contractual relationships". Unlike the Respondents in the instant case, the plaintiffs in the *Schwartz* case had existing contracts and arrangements with the laundry company-employers, which relationships the agreements complained of were designed to destroy. Without a privilege or interest to protect, a party may not interfere with a contract between two other parties.

The Respondents in the instant case have not charged, nor can they charge, that Petitioners have in any way interfered with the agreements or contracts which the Respondents now have, or have ever had. They have never charged that any of the Petitioners, or any of the members of Petitioners' Board have counseled or induced any person to sever or change any relationship which it may have had with either of the Respondents. The reason is obviously that no such conduct has even been attributable to Peti-

tioners, and such is the only conduct which might, in theory, be charged against Petitioners in an action cognizable under the laws of this State.

The *Grillo* case, *supra*, was a case brought by a real estate broker to compel admission to a real estate board operating a multiple listing service in the Plainfield, New Jersey area. In that case, the Court held that the operation of a multiple listing service and a restrictive membership policy constituted an illegal restraint of trade under the law of New Jersey. It is important to note, however, that this opinion of a trial court in New Jersey is not supported by any Appellate Court decision in the State nor does it take full cognizance of the Federal precedents. Moreover, the opinion assumes that Mr. Grillo, unlike Collins and Suburban in this case, was not rejected from membership for a good cause. In contrast, our Respondents were rejected from membership in the Defendant on three distinct occasions, each for good and sufficient cause.

Moreover, the by-laws and regulations of the Defendant in the *Grillo* case prohibited any dealings between members of the Defendant Board of Realtors and non-member realtors and in fact the members were punished if they did so cooperate. MLBR has no such by-laws or regulations. While the multiple listing service is for the exclusive use of members of the Board, there is no rule against cooperating with a non-member broker in the sale of a house which either that non-member broker lists for sale or which has been listed by a member broker to whom a non-member supplies a buyer. Indeed, members of Respondent have, on many occasions, cooperated with non-members in the sale of real estate. In other words, there is no concerted "refusal to deal or group boycott" to which the Court in the *Grillo* case alludes. The members of the MLBR are free to deal with whomever they choose in accordance with the laws

of Pennsylvania. The Plaintiff has not alleged any boycott or concerted refusal to deal by the members of the Board as was apparently the case in the *Grillo* case.

More identical to the instant case are the two recent state court decisions in Maryland and New Mexico. In *Grempler v. Multiple Listing Bureau of Harford County, Inc.*, 258 Md. 419, 166 A. 2d 1 (Ct. App. 1970), the Court of Appeals of Maryland considered the plaintiff's appeal from an order dismissing a complaint in which the plaintiff sought to compel a multiple listing bureau to admit her to membership. As in the present case the Court was faced with an allegation of an unreasonable trade exclusion. The Court, after an extensive review of existing authorities, rejected both attacks and affirmed the dismissal of the complaint. The Court's rationale involved the belief that plaintiff did not establish the existence of a monopoly, was not barred from selling real estate, and was denied admission upon a reasonable basis. An economic disadvantage existed, but not an exclusion from an occupation.

The Court therein distinguished both *Falcone v. Middlesex Medical Society*, 34 N. J. 582, 170 A. 2d 791 (1961), and the *Grillo* case, by stating that in the latter situations the plaintiff was denied the right to practice his occupation at all. In *Falcone, supra,* a state licensed medical doctor was denied membership in the county medical society and lost his privilege to use area hospitals. The New Jersey Supreme Court noted all area hospitals required staff members and physicians with staff privileges to be members of the County Medical Society. Since the Society had a monopoly over the hospital affiliations, the exclusion of plaintiff from the medical society precluded his practicing at all hospitals in the County. Similarly in *Grillo, supra,* the real estate board established a written, coercive policy aimed at excluding a large segment of the broker community, without reason.

In the second state court decision, *Wilson v. Albuquerque Board of Realtors,* 82 N. M. 717, 487 P. 2d 145 (1971), the Court of Appeals of New Mexico considered an appeal by a plaintiff from a summary judgment in an action where the plaintiff had sought to enjoin the Board of Realtors from continuing practices allegedly in restraint of trade and in rejecting his application for membership. In that case, as in the present case, the plaintiff made several applications for membership in the defendant association. The defendant was also a non-profit corporation, and it ran a multiple listing service in its respective area. The Court affirmed the entry of a summary judgment against the plaintiff and it considered directly the allegation of restraint of trade at page 147 of its opinion as follows:

> "The statutory damage claim concerns an alleged combination in restraint of trade, an alleged combination tending to monopolize trade and the asserted civil liability of defendant to plaintiff on the basis that he was injured by the alleged combination. Sections 49-1-1 through 49-1-3, supra. Assuming a claim has been stated, the New Mexico decisions are to the effect that there is no statutory violation unless the restraint of trade is unreasonable. *Elephant Butte Alfalfa Ass'n. v. Rouault,* 33 N. M. 136, 262 P. 185 (1926); *State v. Gurley,* 25 N. M. 233, 180 F. 288 (1919). In determining the question of unreasonableness, the courts have looked to the harm caused by the practice involved and the business excuse or justification for the practice involved. See *Grillo v. Bd. of Realtors of Plainfield Area,* 91 N. J. Super. 202, 219 A. 2d 635 (1966)."

Thus, it is seen that in two recent decisions of other states the reasoning of *Grillo, supra,* has been rejected.

The only case in which such reasoning has been followed was *Oates v. Eastern Bergen County Multiple Listing Service, Inc.*, 113 N. J. Super. 371, 273 A. 2d 795 (1971), in which case the New Jersey Superior Court affirmed the lower court's action declaring the operation of the multiple listing service illegal per se. The Court pointed out in its opinion that the multiple listing service had been created as a separate corporation following the decision in *Grillo*. The Court pointed out that New Jersey had enacted an anti-trust law modeled on the Sherman Act and that the Federal concept of illegality per se would be applied where there was a concerted effort to refuse to trade. In the multiple listing service it was pointed out that there was a limit of fifty-four members and an absolute exclusion of dealing with non-members. The operation of the multiple listing service in *Oates, supra,* is clearly distinguishable from the present case. As pointed out above, there was a maximum number set on the membership and the members were precluded from cooperating with non-members. In the Main Line Board Multiple Listing Service, cooperation with non-members is encouraged and as the figures show the cooperation has taken place.

The only reported case in the Commonwealth of Pennsylvania dealing with a real estate situation is the case of *Anderson v. East Suburban Multilist Real Estate Brokers, Inc.*, 115 P. L. J. 248 (C. P. Allegheny, 1967). In that case, Plaintiff had brought an action against the Defendant and asked the Court to order the Defendant to admit Plaintiff to membership. The Plaintiff in that case, however, unlike the Plaintiffs in the instant case, charged the Defendant with refusing to admit her to membership in violation of her civil rights and specifically on the ground that she was female. The Court held that if

the Defendant had excluded the Plaintiff for that reason, Plaintiff had a cause of action, under the Civil Rights Acts and the Constitution of Pennsylvania and the United States and to exclude Plaintiff from membership because she was female would be a violation of these laws. However, the Court specifically said at page 251:

> "We have examined the by-laws of Multilist and have come to the conclusion that it is nothing more than an entity whose members have banded together for the purpose of promoting their individual business interests as real estate brokers licensed by the Commonwealth of Pennsylvania. We find nothing objectionable to the joining together of persons who have mutual business interest for their own protection and the protection of financial gain so long as they do not violate the laws or public policy of the United States or the Commonwealth of Pennsylvania."

Now if the Respondents had proved that the Petitioners had wrongfully excluded them or violated their constitutionally protected civil rights, they might have made out a case. They did not offer such proof. They simply alleged that the existence of the multilist service conducted by MLBR, is in violation of the common law principles against restraint of trade. As indicated by the *Anderson* case, this is an incorrect view of the law of Pennsylvania, and distinguishable from the present case.

The most persuasive authority which distinguishes mere economic disadvantage from a restraint in trade are the related cases of *Riggall v. Washington County Medical Society,* 249 F. 2d 266 (8th Cir. 1957), and *Elizabeth Hospital, Inc. v. Richardson,* 167 F. Supp. 155 (W. D. Ark. 1958), aff'd. 269 F. 2d 167 (8th Cir. 1959), cert. den., 361 U. S. 884 (1959). Both cases involved suits against the

local medical society seeking to compel membership for Riggall a doctor who was also a director of Elizabeth Hospital. There was no contention that plaintiff was excluded by any by-law of the local association, the alleged complaint being statutory. The Federal Courts concluded that the gist of Dr. Riggall's complaint was that the practice of his profession would have been more profitable if membership in the county medical society was granted. Accordingly his complaint was dismissed because the plaintiff was not prevented from practicing and because no public injury such as coercion or price-fixing existed.

In *Baltimore Co. Hosp. v. Md. Hosp.*, 234 Md. 427, 432, 200 A. 2d 39, 42 (1964) the Court said that a mere deficiency in earnings was not sufficient to warrant compulsory membership:

> "Blue Cross has not combined with or conspired with anyone to interfere with, restrain or prevent the Hospital from carrying on its business, although it is true that the Hospital has suffered economically by not being accepted as a member hospital. However, Blue Cross being a private corporation, has the right to contract with whom it pleases. Its action cannot be construed in restraint of trade . . ."

An analysis of the facts in the instant matter demonstrates the arbitrariness and unconstitutionality of the 4-3 decision (including a concurring opinion and a concurring result) of the Pennsylvania Supreme Court, reversing the unanimous opinion of the Court of Common Pleas of Montgomery County, Pennsylvania. On the one side, the importance of the multiple listing system to the real estate business is overwhelming; the right of a voluntary non-profit corporation to elect its own members is essential. Therefore, there are extremely important policy reasons for not allowing any interference by the Courts.

There was no restraint of trade situation existing to warrant judicial interference. Petitioners submit the reasons are apparent, and the State Supreme Court's contrary decision is unconstitutional. Firstly, the geographic areas of conflict are limited; Respondents state they operate in a three county area while the jurisdiction of MLBR extends over only two and one-half townships. Secondly, there are no written or unwritten rules forbidding cooperation by members with non-members; to the contrary cooperation is encouraged and members have in fact cooperated in the past with non-members, including the Respondents, and will continue to do so in the future. Thirdly, the rules of the MLBR govern internal organization and are not directed at limiting membership and thereby competition, rather they have expanded their membership during the same time the Respondents were rejected. Fourthly, the percentage of sales under the multiple listing service in relation to the total sales in a given year, from 1965 through 1969 inclusive, ranged from 33% to 42%. At least 58% of the sales in any year were made outside the multiple listing service. Fifthly, the By-Laws of MLBR were complied with and Respondents were granted a hearing on their applications. Finally, and most important, the refusal of the Respondents application for membership in MLBR was based upon a valid reason, the unethical conduct of Collins in her real estate business. This reason centered about the action of Collins in bringing false and scurriluous charges against the MLBR, and two of its member brokers, which placed these parties in a position of public ridicule without just cause. In addition it was established that: 1) individual Respondent created an emotional scene and disturbance at the real estate office of Stringer-Sellers; 2) she encouraged the notarization of a deed which was not signed in the presence of a notary pub-

lic; 3) she signed the name of a cooperating broker to an Agreement of Sale without said broker's authorization or knowledge; and 4) her general reputation for ethical conduct in real estate was poor. The record amply supports that these ethical considerations were controlling considerations in rejecting Respondents applications for membership. Respondents would have the Court believe that the sole basis of their exclusion was the action before the Human Relations Commission, which like the testimony and charges before the Commission is false.

All of these factors show the Respondents' rejections were warranted. Furthermore, the subsequent judicial decision requiring Respondents be admitted into membership and/or share in the multiple listing system was arbitrary and erroneous; the property, contractual, and associational rights of Petitioners were taken in violation of the mandates of the First, Fifth and Fourteenth Amendments and the judgment of the Supreme Court of Pennsylvania Eastern District must be reversed.

## CONCLUSION.

The Petition for Writ of Certiorari should be granted because:

(1) The Pennsylvania Supreme Court directive to the Main Line Board of Realtors to admit non-member licensed brokers to its Multiple Listing Service is a deprivation of property and an unwarranted interference with the contractual freedoms guaranteed in the Fifth and Fourteenth Amendments.

(2) Compliance with the Court directive will result in an unwarranted interference with the contractual freedoms of each member in that each member is ordered to contract with others in a Multiple List-

ing Agreement, which involves performance of personal services and division of commissions.

(3) The Multiple Listing System of the Main Line Board of Realtors is not a violation of restraint of trade, either under the per se or rule of reason analysis.

(4) The admission of non-member licensed brokers violates each board member's Constitutional right of association guaranteed by the First Amendment, applicable to the states by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

It is therefore respectfully urged that this petition for writ of certiorari be granted.

Respectfully submitted,

THOMAS J. BURKE,
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*Counsel for Petitioner.*

*Of Counsel:*

JAMES S. KILPATRICK, JR.,
PAUL W. TRESSLER.

## APPENDIX "A".

**Opinion of the Supreme Court of Pennsylvania Eastern District.**

No. 8 January Term, 1972.

MARGARET HILL COLLINS AND SUBURBAN FAIR HOUSING, INC.

*Appellants,*

*v.*

MAIN LINE BOARD OF REALTORS, A NON-PROFIT CORPORATION, WILLIAM P. HUTTON, WILLIAM T. ANDREWS, ROBERT J. DOWNS, FRANK N. WARE, JR., INDIVIDUALLY AND AS OFFICERS AND DIRECTORS OF MAIN LINE BOARD OF REALTORS.

APPEAL FROM FINAL DECREE OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY.

Decided and Filed May 8, 1973.

OPINION.

JUSTICE MANDERINO. FILED: May 8, 1973

Margaret Collins and Suburban Fair Housing, Inc., (Suburban) have taken this appeal from a final decree of the Court of Common Pleas of Montgomery County denying their request for mandatory injunctive relief and damages against the Main Line Board of Realtors. Margaret

Collins, the individual appellant, is a vice president of Suburban, the corporate appellant.

In the three years of 1966, 1967, and 1968, Margaret Collins and Suburban Fair Housing, Inc., both real estate brokers licensed by the Commonwealth of Pennsylvania, sought membership in the Main Line Board of Realtors, a Pennsylvania non-profit corporation, which maintains a real estate multiple listing service exclusively for its members. In 1966, Collins' and Suburban's applications for membership were rejected and the reasons for the rejection were discussed with the applicants. In 1967, the applicants were again refused membership, but were given a formal notice and reasons for the denial, all of which dealt with an allegation that Collins and Suburban had "falsely, improperly and unethically" charged the Main Line Board of Realtors and some of its members with improper conduct. The applicants were again denied membership in 1968 but no additional reasons were given to them.

It was subsequent to their third denial of membership that Collins and Suburban brought an action in equity seeking an injunction to restrain the Main Line Board of Realtors from restricting its multiple listing service to members, an injunction against the Board's denial of membership to Collins and Suburban, an injunction against the Board's two-year waiting period for eligibility to participate in the multiple listing service, a mandatory injunction requiring the Board to accept them as members, and $16,000 compensatory damages in addition to punitive damages. The Chancellor, in his adjudication, dismissed Collins' and Suburban's complaint, concluding that their membership applications had been denied for just cause, that they had no vested property right to membership in the Board, and that nothing in the Board's rules, regulations or by-laws constituted a restraint of trade or a violation of Collins' or Suburban's constitutional rights. Exceptions were taken

to the Chancellor's adjudication and dismissed by the court en banc. Thereafter, this appeal was taken.

Appellants contend that the Main Line Board of Realtors is engaging in a restraint of trade which is unreasonable and, therefore, illegal. They contend that the multiple listing service maintained by the appellee corporation unreasonably restricts competition. We agree.

The multiple listing service of the Main Line Board of Realtors operates as a service to its members in the following way. Each member has "exclusive listings"—listings originally brought to the member's office by prospective sellers of real estate. All exclusive listings of all members are then centrally pooled and made available to all other members to sell. The listing member and the selling member of any property share the sales commission.

Approximately 83 firms doing business in three townships of Montgomery and Delaware County are members of the appellee corporation. Sales through their multiple listing service in their first year of operation, 1965, amounted to $40 million. In 1969 the volume reach $75 million.

A real estate broker who is not a member of the appellee corporation cannot list properties for sale on the multiple list and does not receive the multiple listing service available to members showing all of the properties available for sale by members. A member is also prohibited from listing property on the multiple list if there exists a co-exclusive listing with a nonmember.

A nonmember, who has a property for sale, is thus deprived of the benefits of the multiple listing which brings the property to the attention of member brokers for solicitation of purchasers of said property. The owner of said property, who lists with a nonmember, is thus deprived of the multiple listing benefits.

A nonmember is also deprived of the benefits of having available a list of properties to show to prospective purchasers dealing with a nonmember. Prospective purchasers do not have the benefit of seeing the wide range of properties available and appearing on the multiple list.

A nonmember and clients of a nonmember are restricted from advertising their *products* through the multiple listing service or from receiving significant information about available *products* on the market at any given time. In effect, a nonmember cannot compete in the buying and selling of real estate for clients as effectively as a member of the appellee corporation.

The courts of Pennsylvania have long recognized that agreements in unreasonable restraint of trade are invalid. See *Sun Drug Company v. West Penn Realty Company*, 439 Pa. 452, 268 A. 2d 781 (1970). *Schwartz v. Laundry and Linen Supply Drivers' U., Etc.*, 339 Pa. 353, 14 A. 2d 438 (1940); *Cleaver v. Lenhart*, 182 Pa. 285, 37 A. 311 (1897); and *Nester v. Continental Brewing Company*, 161 Pa. 473, 29 A. 102 (1894).

The United States Supreme Court has examined the problem of membership provisions in voluntary associations which have the effect of unreasonably restraining trade in *Associated Press v. United States*, 326 U. S. 1, 89 L. Ed. 2013 (1945). That case involved a co-operative association of newspaper publishers whose purpose was to expedite the collection, assembly and distribution of news. The by-laws of the association prohibited all members from selling news to nonmembers and gave members the power to block membership to nonmembers. The government brought a suit against the Associated Press under the Sherman Act (26 Stat. 209, 15 USCA Sec. 1) alleging that the

association constituted a combination in restraint of trade in news. The *Associated Press* case arose under the applicable federal law—the Sherman Anti-Trust Act. However, the theory of that case and the result is applicable here. This Court has previously recognized that the Sherman Act ". . . is merely the application of the common-law doctrine concerning the restraint of trade to the field of interstate commerce." *Schwartz v. Laundry & Linen Supply Drivers' U., Etc., supra.* In *Associated Press v. United States, supra,* the Court stated:

> "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. Victory of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* 'enterprise and sagacity;' such hampering of business rivals can only be attributed to that which really makes it possible—the collective power of an unlawful combination."

The *Associated Press* case is particularly applicable to the present case. Here the Board consists of "Associates" —or members—whose banding together has necessarily and significantly hampered an outsider's opportunities to buy and sell in the Main Line area.

In *Associated Press, supra,* the agreement was held to be an unreasonable restraint of trade—illegal on its face. We think the same can be said of the agreement in this case unless all real estate brokers licensed by Pennsylvania and in good standing under State law, operating in the area covered by the appellee corporation, are admitted to membership.

An agreement among 83 firms, doing $75 million in multiple listing business, not to do business in a significant manner with other property licensed individuals in the same area per se restricts competition unreasonably. Economic or business competitors are not permitted to enter such agreements in restraint of trade because they are unreasonable. In *Schwartz v. Laundry & Linen Supply Drivers' U., Etc., supra,* this Court said:

> ". . . the law will not permit an arrangement, understanding, agreement, or combination among all those in the trade in a given locality, the effect of which is to deprive others of the right to engage in that industry and to deprive the public of the benefits of fair competition therein. No group may enhance its own interests at the expense of the legal rights of others, nor by acts or agreements violating public policy, interfere with the interests of the public . . ."

It is not necessary to establish that competition has in fact been restricted by the monopolistic agreement. It is sufficient if the illegal bargain tends to create or has for its purpose to create a monopoly in prices or products. Restatement of Contracts Section 515: See also *Associated Press v. United States, supra,* which said that,

> ". . . Combinations are no less unlawful because they have not as yet resulted in restraint. An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be 'wholly nascent or abortive on the one hand, or successful on the other.' For these reasons the argument, repeated here in various forms, that AP had not yet achieved a complete monopoly is wholly irrelevant . . ."

The appellees contend that the members of the appellee corporation are free on an individual basis to collaborate with nonmembers in the sale of real estate. That the appellee corporation may permit such cooperation is totally irrelevant. Possible isolated acts of cooperation between members and nonmembers does not alter the fact that nonmembers are deprived of the use of the multiple listing service in the buying and selling of real estate.

The appellee corporation contends that it can properly establish rules and regulations for membership and can deny membership to a licensed real estate broker according to its own rules and regulations. This cannot be done in a field that has already been preempted by State regulation. Pennsylvania provides for the regulation and licensing of real estate brokers. A Real Estate Commission exists which has the power to refuse, suspend or revoke licenses after complaints have been filed and hearings held. The Commission also has formulated specific enumerated wrongful acts which are the basis for refusing, suspending or revoking a real estate broker's license. *See* Real Estate Broker License Act of 1929, Act of May 1, 1929, P. L. 1216, Sec. 1 et seq., as amended, 63 P. S. 431 et seq.

If the appellee corporation has evidence which would justify suspension or revocation of the appellants' real estate licenses, that evidence should be presented to the Real Estate Commission of Pennsylvania for proper state action. The appellee corporation cannot privately decide that someone should not be a licensed broker. Such judgments are for the proper state agency. Neither the appellee corporation nor the courts should in the first instance usurp the perogative of the Pennsylvania Real Estate Commission. Until that agency properly acts, a licensed real estate broker is entitled to be treated as an equal with all other licensed brokers in determining membership in the appellee corporation.

The reasons given by the appellees for excluding the appellants from membership should be presented to the Real Estate Commission. If appellants' licenses are suspended or revoked then, and only then, can appellants be barred from participating in a highly valuable economic and competitive tool such as multiple listing.

One of the reasons, for example, given by the appellee corporation for denying membership to the appellants centered around charges brought by appellants on behalf of a client against the appellee, charging it with discrimination before the Pennsylvania State Human Relations Commission. Although the charge was dismissed by the Commission, the Board felt that Collins had maligned its reputation by bringing the charge. We think it sufficient to say that Collins and Suburban should not now be permitted to be penalized for assisting a client in an attempt to assert his constitutional right to petition the government for a redress of grievances. The court below also listed various other reasons which it considered valid enough to justify the rejections. However, none of these reasons were ever given to Collins and Suburban and were, in fact, only superficially mentioned at trial. In any event, they were never the subject of any action against Collins or Suburban by the State Real Estate Commission.

The appellants are entitled to the equitable remedy of injunction to prevent the carrying out of the illegal contract or combination. See *Schwartz, supra.* The record, however, does not provide any legal basis for an award of damages.

The decree of the court below is reversed and the appellees are directed to modify membership regulations so that the appellants and all other persons meeting the requirements of the laws of the Commonwealth of Pennsylvania authorizing such persons to act as real estate brokers qualify for immediate membership and participa-

tion in the multiple listing service. In the alternative, the appellees are directed to modify their regulations so that nonmembers may immediately participate in the multiple listing service on equal terms with members.

Decree of the court below reversed. Costs shall be paid by the appellees.

Mr. Chief Justice Jones filed a dissenting opinion in which Mr. Justice O'Brien and Mr. Justice Roberts joined. Mr. Justice Eagen concurs in the result. Mr. Justice Pomeroy filed a concurring opinion.

## APPENDIX "B".

### Dissenting Opinion.

JONES, *C. J.* Filed: May 8, 1973.

I do not believe the Main Line Board of Realtors or the multiple listing service maintained by that organization constitutes an unreasonable restraint of trade and, therefore, I dissent.

In concluding that the multiple listing service operated by the Main Line Board of Realtors is a combination in restraint of trade and therefore illegal, the majority has ignored much of the evidence presented to the court below as well as the chancellor's determination based on that evidence. There is no question that the multiple listing service operated in the Main Line area is a useful merchandising tool or that members of the Main Line Board of Realtors benefit substantially from its operation. Nor can it be denied that under certain circumstances members of the multiple listing service may enjoy some competitive advantage over realtors who do not participate in the program.

This Court has the power to strike down any agreement, association or contract which unreasonably restrains trade. However, not every agreement which creates a restraint of trade is unreasonable. As stated by Justice Brandeis in *Chicago Board of Trade v. United States,* 246 U. S. 231, 238 (1918):

> "(T)he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade restrains. To bind, to restrain, is of their very essence. The true test of legality is whether it is such as may suppress or even destroy competition."

In this case there was a lengthy trial with both sides presenting numerous witnesses and exhibits. The chancellor stated in his initial adjudication:

> "(T)he multiple listing service of the Main Line Board of Realtors is not an economic necessity in the buying and selling of real estate. There was a great amount of evidence at trial bearing on the percentage of sales obtained from the service and, while the statistics were often in confusion, most brokers who testified stated that the use of the service, while advantageous, was not essential for economic survival as a real estate agent."

The chancellor concluded:

> "In all, the Main Line Board of Realtors is a reasonable banding together of licensed real estate brokers who have a legitimate interest in the qualifications of new members. The association, while having an effect on trade, does not impose an unreasonable restraint thereon . . . ."

I believe the chancellor's findings are adequately supported by the record and are in accord with the general principles of law applicable to these facts.[1]

Relying primarily on the decision of the United States Supreme Court in *Associated Press v. United States,* 326 U. S. 1 (1949), and the decision of this Court in *Schwartz*

1. At issue in this appeal is the question of whether an appellate court, acting under the aegis of eliminating combinations in restraint of trade, can compel a non-profit corporation to accept members the association has previously deemed unqualified for membership. The general rule applicable to this matter is summarized as follows in Annot., 89 A. L. R. 2d 964, 966 (1963):

> "Although the Courts will compel reinstatement of a member of an association or society who has been wrongfully or arbitrarily expelled, the general rule is that the courts cannot compel admission of an individual into a voluntary association, since membership is a privilege and not a right, and even if a person's application is arbitrarily refused, he is without legal remedy."

*v. Laundry & Linen Supply Drivers Union,* 339 Pa. 353, 14 A. 2d 438 (1940), the majority holds that the multiple listing service operated by the Main Line Board of Realtors "per se restricts competition unreasonably." I cannot agree for two reasons: (1) the authorities relied on by the majority are factually distinguishable and (2) the decision that this agreement "per se restricts competition unreasonably" is not supported by the facts presented at the hearing.

There were two primary considerations in *Associated Press v. United States,* which motivated the United States Supreme Court to strike down certain by-laws of the Associated Press. Neither of those factors is present in the instant case. First, the Associated Press by-laws absolutely prohibited the sale of news by members of the association to non-members. This rule made it impossible for any non-member to obtain news from an Associated Press member. The by-laws of the Main Line Board of Realtors and the multiple listing service are clearly distinguishable. There is no rule, either written or informal, which prohibits members of the Main Line Board from cooperating with non-members in the sale of any parcel of real estate. Indeed, there was testimony presented at the hearing and the chancellor found as a finding of fact that "(m)embers of defendant Board have on numerous occasions participated in and cooperated with plaintiffs in the sales of real estate in the Board's territory."[2]

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2. The Main Line Board's practice of permitting and even encouraging cooperation with non-member realtors also distinguishes this case from Grillo v. Board of Realtors of Plainfield Area, 91 N. J. Superior Ct. 202, 219 A. 2d 635 (1966). Although the *Grillo* decision is not cited by the majority, it was the first decision to apply common-law restraint-of-trade principles to multiple listing services. A key factor in that decision was the by-laws of the service which prohibited all members from dealing with non-members and provided severe penalties for violators.

The second provision of the Associated Press by-laws which the Supreme Court found objectionable concerned the disparate membership requirements demanded of newspapers seeking to join the association. Whereas newspapers which would not be in competition with established Associated Press members could join the association quite easily, it was virtually impossible for a newspaper in competition with an existing member to gain admittance. The effective exclusion of all competitors denounced in *Associated Press* clearly is not present in this case. At the time of the hearing there were eighty-three individual firms who were members of the Board—all selling real estate in the three-township Main Line area. Moreover, the record reveals that the Board was continuing to accept new members who fulfilled the admission requirements set forth in the by-laws.[3] In *Associated Press*, the Supreme Court ruled that the "joint effect" of the exclusive dealing requirement coupled with the systematic exclusion of all competitors from membership was an unreasonable restraint of trade. Since neither of the factors crucial to the decision in *Associated Press* is present in this action, it is difficult to discern how that case can be regarded as primary or even persuasive authority for the decision reached by the majority.

Similar distinctions can also be drawn between the provisions of the Main Line Board of Realtors' multiple

3. Frank R. S. Sellers, who was presiding over the Board of Directors of the Main Line Board of Realtors in 1967, testified that in February of 1967 eight applications for membership were presented, including the appellant's application. Six of those applications were approved and two were disapproved. *Cf.* Oates v. Eastern County Multiple Listing Service, Inc., 113 N. J. Superior Ct. 371, 273 A. 2d 795 (1971), where a multiple listing service which limited its membership to fifty-four original members or their successors was declared in violation of the New Jersey anti-trust law. N. J. S. A., 56:9-1 *et seq.*

listing service and the contract which is invalidated in *Schwartz v. Laundry & Linen Supply Drivers Union.* The effect of the invalid contract provisions was to prevent the entry of any more independent laundry jobbers into the industry by *prohibiting* all signatories of the contract from dealing with any independent jobbers not under contract at the time the contract was executed. Once again the distinction is obvious: members of the Main Line Board are not only permitted to cooperate with non-members—they are encouraged to do so. The majority is in error when it states that "such cooperation is irrelevant."

I cannot agree with the majority's statement that the multiple listing service at issue in this case "per se restricts competition unreasonably." The lengthy testimony presented at the hearing and the facts as found by the chancellor do not support that conclusion. As noted earlier, not every restraint of trade or every agreement which confers some competitive advantage on its principals is void as a restraint of trade. It is only when the agreement results in an unreasonable restraint that it is subject to judicial interference. I agree with the chancellor that the operation of the Main Line Board's multiple listing service does not unreasonably restrain trade. An analysis of all real estate sales negotiated by members of the Main Line Board from 1967 through 1969 reveals three major categories of sales [illegible] during that period: (1) sales of properties by a member broker which were never listed with the multi-list service; (2) direct sales which, although listed on the multi-list service, were sold by the listing broker and did not involve cooperation between brokers; and (3) cooperative multi-list sales where the property was listed by one broker and sold by another member broker. Only the third category, cooperative sales, involved the active operation of the multiple listing service.

Between 1965 and 1969 this category of sales never exceeded 42% of the total dollar volume of sales negotiated by members of the Main Line Board of Realtors. In other words, 58% of the sales consummated by member realtors were independent of the multi-list service, involving only the seller, the listing broker and the buyer. On the basis of those figures I believe the chancellor was justified in finding that the multiple listing service, whle admittedly benefitting its members, did not constitute an unreasonable restraint of trade.

One other area of the majority opinion requires comment. The majority seems to intimate that private associations with restrictive membership requirements are impermissible in fields which are regulated and licensed by the Commonwealth. I cannot find any support for that position and strongly disapprove it. The Legislature has created licensing provisions for virtually every occupation which involves some measure of public trust—from auctioneers to weighmasters. The purpose of state licensing is to insure that every person engaged in a regulated activity meets certain *minimum* standards of honesty and competency. There is nothing in this legislatively created scheme of regulation which suggests that individuals engaged in a regulated occupation should be prohibited from banding together in professional associations with an eye toward enhancing the prestige and expertise of their members. Judicial intervention in the membership decisions of private associations is only warranted when association membership is such an essential element of the profession that a non-member is precluded from practicing his profession, provided that the membership requirements do not violate rights created by statute or by the Constitution. *Commonwealth Human Relations Commission v. Loyal*

*Order of the Moose No. 107*, 448 Pa. 451, 294 A. 2d 594 (1972). *See Falcone v. Middlesex County Medical Society*, 34 N. J. 582, 170 A. 2d 791 (1961) (compelling admission of Doctor of Osteopathy to County Medical Society where membership in the society was necessary in order to have hospital privileges).

The majority's rule that the Main Line Board of Realtors must accept all realtors who fulfill the state-mandated minimum requirements is predicated on the assumption that membership on the Board is *essential* for all realtors. The record clearly demonstrates that that assumption is erroneous. It can hardly be said that the Main Line Board was "privately deciding that someone should not be a licensed broker" where there was ample evidence that membership in the Main Line Board and participation in its multiple listing service was found not necessary for economic survival as a realtor in that area.

In holding that the Board must open its membership to all licensed brokers, the majority opinion overlooks the substantial interest the existing members of the Board have in *selecting* those they desire to bind themselves to in a contractual manner. The heart of the multi-list service is its mandatory nature. Any property not sold by the broker who initially lists the property must be referred to the multi-list service for dissemination to all other members. Thereafter, if another member produces a buyer for the property, the original listing broker is required to share his commission with the selling broker . The effect of the majority decision is to force the existing members of the multi-list service into a binding relationship with anyone who meets the minimum qualifications prescribed by the State. Since participation in the multiple listing service is not essential for survival as a realtor on the Main Line and the operation of the service does not constitute

an unreasonable restraint of trade, there is no justification for this invasion of private contract rights.

I would affirm the decree of the chancellor.

Mr. Justice O'Brien and Mr. Justice Roberts join in this dissenting opinion.

## APPENDIX "C".

### Concurring Opinion.

POMEROY, *J.* FILED: May 8, 1973

I agree with the conclusion reached by the majority: the multilisting practice of appellee which operates to exclude a licensed broker from membership is *per se* unlawful under our State's common law as an unreasonable restraint of trade. There is, however, very little State common law on the subject in view of the fact that trade restraints of this nature have been historically of federal concern under the Sherman Act.[1] I think it reasonable and desirable, therefore, to determine what the federal law is on the subject and then to consider whether there are valid reasons for eschewing that law in Pennsylvania.[2] In the case before, us the federal law and our rather meager State law coincide, and I am persuaded that the result is sound. Since this approach to the matter is somewhat different from that of the Court, I elaborate upon it in the balance of this concurring opinion.

The Court's opinion is correct in its observation that the federal courts have in the past held some agreements among participants in an industry which exclude other participants unreasonable *per se*. See, e.g., *Fashion Orig-*

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1. Section 1 of the Sherman Act, July 2, 1890, ch. 647, Sec. 1, 26 Stat. 209, as amended, 15 U. S. C. Sec. 1 (1970), reads in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal . . ."

2. But cf. P. Areeda, Antitrust Analysis 315 (1967): "Beware of the 'per se' label. There are cases where one can weigh harms, benefits and alternatives and conclude almost instantaneously that conduct is unlawful; one decides the particular case so rapidly that the may express his result in 'per se' language."

*inators' Guild v. Federal Trade Commission,* 312 U. S. 457, 85 L. Ed. 409 (1941); *Associated Press v. United States,* 326 U. S. 1, 90 L. Ed. 489 (1945); *Klor's Inc. v. Broadway-Hale Stores,* 359 U. S. 207, 3 L. Ed. 2d 741 (1959).[2] At the same time, however, there exist a substantial number of decisions which approach on a "rule of reason" analysis agreements among participants which have the effect of creating associations from which other participants are excluded. See, e.g., *Board of Trade of Chicago v. United States,* 246 U. S. 231, 62 L. Ed. 683 (1918); *Silver v. New York Stock Exchange,* 373 U. S. 341, 10 L. Ed. 2d 389 (1963); *Dessen v. Professional Golfer's Association of America,* 358 F. 2d 165 (9th Cir.), cert. denied, 385 U. S. 846 (1966); *American Federation of Tobacco Growers v. Neal,* 183 F. 2d 869 (4th Cir. 1950); *Molinas v. National Basketball Assoc.,* 190 F. Supp. 241 (S. D. N. Y. 1961). The problem in a case such as that at bar is to determine which agreements are *per se* unlawful and which are unlawful only if shown by evidence to work an unreasonable restraint of trade. One commentator has suggested what commends itself to me as a sensible test for resolving the problem: "[E]xclusionary measures would be permitted when [1] essential for efficient operation of an entire industry or [2] when justified by public policy."[3] I will discuss this case in terms of these two criteria.

(1) *Efficient Operation.* Some industries, by their nature, require a banding together of industry participants in order to conduct business. Stock markets (*Silver,* supra) and commodity exchanges (*Chicago Board of Trade,* supra) are two examples of industries which would be

3. Comment, Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason, 65 Col. L. Rev. 1486, 1987 (1966) [hereinafter referred to as *Columbia Comment*].

altogether eliminated if an agreement among brokers to create a central market was, without more, unlawful. The same is true of professional sport activities (*Dessen*, supra —golf; *Molinas*, supra—basketball). Thus the exclusion by the Professional Golfers' Association, for example, from tournament competition of a player lacking the necessary competitive skill could hardly be said, without more, to violate a law against trade restraint.

In contrast, real estate, unlike stocks and commodities, can be and is sold in individual, face-to-face transactions without the need for a central exchange. As the Chancellor's opinion below states, "(T)he multiple listing service of the Main Line Board of Realtors is not an economic necessity in the buying and selling of real estate." Indeed, the data cited in the Chief Justice's dissenting opinion would indicate that some 58% of the dollar value of real estate business in the Main Line area was transacted without the benefit of multilisting. And while the multiple listing arrangement may tend to promote efficient operation in the sale of real property, no reason is apparent why all qualified brokers in a geographic area should not participate. In short, I do not think that it can be said that the practice of multiple listing of properties for sale by less than all licensed brokers of the area is "*essential* for efficient operation of an entire industry."[4]

(a) *Public Policy.* The commentator cited above, whose test I am here applying, suggests that public policy justifications necessary to prevent application of a *per se* rule may be found in "governmental expressions of pur-

4. If the formation of markets or exchange is essential to the operation of an industry, then such an association may promulgate reasonable rules limiting membership, defining hours of operation, etc. See *Rogers v. Douglas Tobacco Board of Trade*, 244 F. 2d 471 (5th Cir. 1957); *Cowen v. New York Stock Exchange*, 371 F. 2d 661 (2d Cir. 1967), aff'g 256 F. Supp. 462 (N. D. N. Y. 1966).

pose" and in "the need for self-regulation inherent in the industry." Such justification, however, "must reflect a readily identifiable public interest and not merely the wishes of the trade association, for the courts should not serve as arbiters of the desirability of the association's goals."[5] The Real Estate Brokers License Act, May 1, 1929, P. L. 1216, as amended, 63 P. S. § 431 et seq., contains a comprehensive scheme for protecting the public against unscrupulous practices of licensed and unlicensed brokers. The Act does not contain any "governmental expressions of purpose" to leave to a trade association the task of enforcing either the standards of the Act or high standards.[6] For reasons already given, I do not see in the nature of this industry any inherent need for the practice of excluding brokers who are licensed by the State.[7]

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5. *Columbia Comment,* supra note 4, at 1499.

6. But see Securities Exchange Act of 1934, June 6, 1934, ch 404, 48 State. 881, 15 U. S. C. §§ 78o-3, 78s (1970), where it is not only provided that brokers adhere to government-established standards of conduct, but is further provided that trade associations (registered exchanges or registered broker-dealer associations) will enforce the standards of the Act as well as other standards.

Compare the unmistakable expression of legislative purpose to permit private parties to maintain trade restraining agreements contained in the "Fair Trade Act," Act of June 5, 1935, P. L. 266, as amended, 73 P. S. §§ 7-11.

7. Appellees deny that they refused membership to appellant Margaret Hill Collins for the reason that she represented a client before the Pennsylvania Human Relations Commission in prosecuting a complaint of racial discrimination against appellee Board of Realtors. Although appellee terms that complaint "false and scurrilous", I note that the Commission, although dismissing the complaint, observed that the Board "can understand why the complainant and her representative, Margaret Collins, felt that racial discrimination was practiced against the complainant."

The remaining justification for denying membership is the appellee's statement that "the record amply supports that there were other ethical considerations. . . ." We are not told in plain language the nature of these "other ethical considerations", nor are we directed to any location in the eight-hundred page record of this case where they might be found.

The practice of multilisting is undoubtedly a useful economic tool in this industry. A multilisting broker has two business advantages over brokers who are not in a position to render that service: (1) he can offer his clients access to a larger pool of potential buyers than can appellants, and (2) he himself has access to a larger number of potential sellers. It ignores reality to suggest, as does appellee, that the fact that it has not *forbidden* its members to cooperate on an individual transaction basis with nonmember brokers can serve to place nonmember brokers on a par with the virtually automated listings available to members.[8] Were the appellee an association formed to advocate higher standards in the real estate broker profession and did so by distributing information and participating in public debate, I doubt we would find it an unreasonable restraint of trade. But where, in the name of higher business standards, appellee places its competitors (i.e., its nonmember broker competitors) at a palpable economic disadvantage, I think the justification offered "must reflect a readily identifiable public interest." See *American Medical Association v. United States,* 130 F. 2d 233, 248-49 (D. C. Cir. 1942), aff'd, 317 U. S. 519 (1943).[9] This the record before us fails to do.

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8. Austin, Real Estate Boards and Multiple Listing Systems as Restraints of Trade, N. Y. L. J., March 2-5, 1971:

> "A Nonmember broker, qualified under state laws to practice his trade, is unable to attain the same economic benefits as a rival who happens to be a member of the local real estate and its multiple listing system. It need hardly be noted that this harm to particular classes of market participants results in public harm —a public harm that is magnified by the important relationship of housing to the national well-being."

9. "(A)ppellants were permitted to organize, to establish standards of professional conduct, to effect agreements for self-discipline and control. There is a very real difference between the use of such disciplines and an effort upon the part of such associations to destroy competing professional or business groups or organization. . . . (A)ppellants have open to them always the safer and more kindly weapons of legitimate persuasion and reasoned argument. . . ."

**The result which the Court has here reached today is, I believe, one which a federal court would have reached under section 1 of the Sherman Act. Although the United States Department of Justice, Antitrust Division, has been taking associations of real estate brokers to court with increasing frequency, my investigation indicates that to date all such cases have been terminated by the entry of consent decrees which prohibit, inter alia, the fixing of rates of commission [10] and the exclusion of licensed brokers.[11]**

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10. At trade association of realtors which *fixes commission rates* is *per se* unlawful. *United States v. National Real Estate Boards*, 339 U. S. 485, 489, 94 L. Ed. 1007 (1950). The rules and regulations of appellee's multiple listing service provide: "No listings will be accepted for publication at *less than 6% commission*. . . ."

11. See *United States v. Greater Pittsburgh Board of Realtors*, Civil Action No. 72-499 (W. D. Pa., consent decree filed April 16, 1973) ("(Defendants) shall upon application made admit to membership any person duly licensed . . ."); *United States v. Los Angeles Realty Board*, 1973 Trade Cases. para. 74,366 (C. D. Cal., consent decree filed Feb. 16, 1973) (enjoining commission rate fixing); *United States v. Multiple Listing Services*, 1973 Trade Cases para. 74, 221 (D. Ore., consent decree filed Dec. 5, 1972) ("The consenting defendant is ordered and directed to admit to membership any per son duly licensed as a real estate broker under the laws of the State of Oregon. . . ."); *United States v. Long Island Board of Realtors, Inc.*, 1973 Trade Cases para. 74,068 (E. D. N. Y., consent decree filed Aug. 1, 1972) ("Accept all licensed brokers"); *United States v. Memphis Board of Realtors*, 1973 Trade Cases para. 74,056 (W. D. Tenn., consent decree filed July 27, 1972) ("admit to membership any person duly licensed as a real estate broker under the laws of the State of Tennessee").

## APPENDIX "D".

**Opinion of the Court of Common Pleas of Montgomery County, Pennsylvania En Banc.**

MARGARET HILL COLLINS AND
SUBURBAN FAIR HOUSING, INC.

*v.*

MAIN LINE BOARD OF REALTORS, A NON-PROFIT CORPORATION; WILLIAM P. HUTTON, WILLIAM T. ANDREWS, ROBERT J. DOWNS, FRANK N. WARE, JR., INDIVIDUALLY AND AS OFFICERS AND DIRECTORS OF MAIN LINE BOARD OF REALTORS.

OPINION SUR EXCEPTIONS TO ADJUDICATION.

HONEYMAN, *J.* March 4, 1971

The above entitled case was tried before the undersigned judge sitting as Chancellor on March 10, 11, 12 and 13, 1970. Thereafter on August 5, 1970 the Chancellor entered an Adjudication of the matter dismissing plaintiffs' Complaint. Plaintiff thereafter filed exceptions to the August 5th Adjudication, within the twenty day time period.

Essentially, the exceptions taken by the plaintiff reiterate several of the arguments before this Court in the original Adjudication. Basically they are (1) that the defendant Board of Realtors, with regard to its Multiple Listing service, is an illegal combination in restraint of trade; (2) that there are no standards set by the Board reasonably

calculated to advise plaintiff of the requisites for admission to the Board; (3) even if such standards exist, the reasons advanced by the Board denying plaintiffs' admission were insubstantial and based upon vindictiveness toward the plaintiff. These will be treated seriatam.

Whether or not the operation of a Multiple Listing Service by the defendant Board is in restraint of trade is a somewhat novel question in Pennsylvania. In the case of *Anderson v. East Suburban Multilist Real Estate Brokers,* 44 D. & C. 2nd 53 (1966) the Court held that there is nothing objectionable about the banding together of Brokers to promote their individual business interests. Plaintiff relies heavily on the case of *Grillo v. The Board of Realtors of the Plainfield Area,* 219 A. 2d 635 (N. J. Superior Ct. 1966). In the original adjudication this Court inadvertently underestimated the decision in that case. Grillo, after being denied membership by the Board, brought this action to declare the Multiple Listing Service of the Board an illegal combination and in restraint of trade. The Court held that such an operation, as practiced by the Board in its Multiple Listing Service, was in restraint of trade, being arranged to exclude plaintiff and other non-members from access to Multiple Listed properties. *Grillo,* however cannot be controlling in the instant case for two reasons: first, it is a New Jersey case decided at the trial court level and was not reviewed by an appellate court; second, and more important, it is factually different. In *Grillo* the by-laws of the Plainfield Area Brokers Association forbade any dealings between members and any other non-member Brokers. The defendant, in the instant case, has no such by-law. Any Broker of the Main Line Board can and has co-operated with any non-member on a sale of a house which that non-member lists for sale or for which a buyer is supplied by a non-member. In other

words, there is no concerted "refusal to deal or group boycott" to which the court in *Grillo* alludes.

Further, Pennsylvania has no "Little Sherman Act" prohibiting illegal combinations in restraint of trade as do some other states. There being no statutory basis upon which plaintiff can base her claim, she, in essence is seeking to fashion a common law remedy which other jurisdictions have seen fit to create by statute because they did not exist at common law, and which the legislature of this Commonwealth has never seen fit to create.

The plaintiff next argues that there are no standards enumerating the requisites for admission to the Main Line Board. The plaintiff in this brief states "as to membership there is no provision setting standards for membership, grounds for rejection or procedure for hearings if rejected." On page 76 of the 1970 Year Book for the Main Line Board, in the By Laws section, the procedural requirements are set forth for gaining admission to the Board. They require a written application seconded by two members of the Board accompanied by an entrance fee. This is forwarded to the Chairman of the Membership Committee and published in the next Board Bulletin. A meeting is then held at which the applicant shall be notified to attend. The Membership Committee then makes a recommendation to the Board where a two-thirds affirmative vote is necessary for election into membership. On page 74 of the same volume further guidelines are set forth. Under Section 2 Eligibility for Membership section (a) a one year residency requirement is established, however, if the applicant's "honesty, integrity, ethics, credit etc." can be checked by investigation elsewhere in the state this period can be waived. In other words these qualities are the ones considered in accepting or rejecting an applicant for membership. Clearly they are reasonable standards, and the

Board has a justifiable interest in admitting to membership only those it feels are qualified and who would promote the best interests of the association.

Finally, plaintiff claims that, even if there are standards by which applications for membership can be accepted or rejected the reasons put forward by the Board in rejecting the application of plaintiff are frivolous, without merit, and based on vindictiveness by the members of the Board toward plaintiff.

After plaintiff had submitted her application form and followed the prescribed procedure, she was notified of rejection by the Board. Without again listing the reasons, which are contained in the original adjudication, this Court believes them to be sufficient to warrant plaintiff's rejection. Clearly after plaintiff complied with the initial requirements for application the burden of showing her unfit for membership shifted to the Board. At the trial the defendant Board presented evidence which indicated that there was sufficient cause for rejection. In a note contained in 89 ALR 2nd 964 the cases involving those instances where courts have compelled membership to professional associations or societies are catalogued. A fair and brief synopsis of that note is that courts traditionally will not compel admission to such societies. However, if the membership in that society be such an economic necessity that non-membership virtually precludes the practice of the underlying business or profession, courts compel admission. *Falcone v. Middlesex County Medical Society*, 34 N. J. 582, 170 A. 2d, 701 (1961). In the instant case there is no such economic necessity. The plaintiff is free to engage in the business of buying and selling real estate whether or not she is a member of the Main Line Board. Further, even if such economic necessity exists, this would still not preclude rejection by the Board for good cause. No precise defini-

tion of "good cause" can be given. However, it would not be sufficient to support the rejection of an application if the basis therefor were whimsical or capricious, or because the applicant was a woman, *Anderson*, supra, or because of an applicant's race. On the other hand the Board need not show that the applicant is a complete scoundrel or felon. What is necessary is a showing that for several good and sufficient reasons it would be undesirable to have the applicant admitted into membership. This the Board has done.

In conclusion, the Main Line Board of Realtors' rejection of plaintiff's application for membership is valid. As a business or professional society the members have an interest in the composition of their association. Having given good and sufficient reasons for their denial and having followed the procedure in their by-laws, this court should not compel them to admit the plaintiff. Further, even though not a member, plaintiff has no legally enforceable right to the use of the multiple listing service run by the Board since the evidence clearly supported the findings that members of the Board have participated in and cooperated with plaintiffs in real estate sales, and that participation in the multiple listing service is not essential to plantiffs' economic success.

## ORDER.

AND NOW, this 4th day of March, 1971, the Exceptions to the Adjudication are dismissed and the Decree Nisi of August 5, 1970 is ordered to become the Final Decree by this Court.

HONEYMAN, *J.*
Honeyman, *J.*

*Court en banc:*
HONEYMAN, *J.*
VOGEL, *J.*
TREDINNICK, *J.*

*Attorney for Plaintiffs:*
DAVID B. FITZGERALD, ESQ.

*Attorney for Defendants:*
ROBERT E. SOLTA, ESQ.

## APPENDIX "E".

**Adjudication of the Court of Common Pleas of Montgomery County, Penna.**

MARGARET HILL COLLINS AND SUBURBAN FAIR HOUSING, INC.

*v.*

MAIN LINE BOARD OF REALTORS, A NON-PROFIT CORPORATION; WILLIAM P. HUTTON, WILLIAM T. ANDREWS, ROBERT J. DOWNS, FRANK N. WARE, JR., INDIVIDUALLY AND AS OFFICERS AND DIRECTORS OF MAIN LINE BOARD OF REALTORS.

### ADJUDICATION.

HONEYMAN, *J.* August 5, 1970

Plaintiffs, Margaret Hill Collins and Suburban Fair Housing Inc. filed a Complaint in Equity against the defendant corporation, Main Line Board of Realtors and its individual officers and directors. Defendants filed preliminary objections in the nature of a demurrer to the original Complaint. The Court en banc dismissed plaintiffs' Complaint but with leave to file an Amended Complaint within twenty days. The Plaintiffs thereafter filed an Amended Complaint and defendants filed preliminary objections thereto. The Court entered an order dismissing the Complaint as to the individual defendants but overruling it as to the Main Line Board of Realtors. Defendant, Board, filed an answer and the issue was tried before the undersigned Judge sitting as Chancellor.

In the Amended Complaint, the plaintiffs, who are licensed real estate brokers (however, the individual plaintiff is an officer and full time employee of the corporate plaintiff and the latter's licensure is directly dependent upon the former's licensure, and therefore for our purposes they, in reality, are one entity) claim that (1) they are non-members of the defendant Board which operates a multiple listing service for the exclusive use and benefit of its members and to the exclusion of plaintiffs and other non-members, and that the great majority of residential real estate offerings within the territory of the Board are made through such service resulting in sales of $4,000,000 per month, and that such service provides the major source of income in the real estate business in the Board's territory; (2) that plaintiffs are eligible for membership in the defendant Board but have been rejected three successive times without good cause or reason; (3) that such rejection has had and will continue to have the effect of obstructing, suppressing and perhaps destroying plaintiffs' business; (4) that defendant Board is a non-profit corporation of a public or semi-public character and cannot lawfully refuse membership to any duly qualified real estate broker licensed by the Commonwealth of Pennsylvania and that defendant Board's refusal of membership to plaintiffs was arbitrary, capricious, discriminatory and contrary to public policy and public interest; (5) that defendant Board's operation of the multiple listing service is an unlawful restraint upon the real estate business generally and is an illegal restraint of trade; (6) that by reason of all the foregoing plaintiffs have suffered and will continue to suffer irreparable and permenant damage and loss; (7) that defendant Board's actions are wilful and malicious entitling plaintiffs to punitive damages; and (8) that plaintiffs have no adequate remedy at law. Plaintiffs pray (1) for injunction restraining defendant Board

from restricting multiple listing service to its members; (2) for injunction against defendant Board's denial of membership to plaintiffs; (3) for injunction against defendant Board's two year waiting period requirement for eligibility to participate in the multiple listing service; (4) for mandatory injunction requiring plaintiffs admission to membership in defendant Board; (5) for $10,000 compensatory damages; and (6) for punitive damages.

The defendant Board's answer (1) denies that its multiple listing service is refused to non-members, and denies that its use is restricted to broker-members only after a two year waiting period to each new members; admits that more than fifty per cent of all residential properties for sale within the Board's territory are listed in its multiple listing service, but denies that this is the "great majority" or that its multiple listing service provides the major source of income in the real estate business in its territory; and denies that such service results in monthly sales of $4,000,000; (2) denies the eligibility of plaintiffs from membership in the Board and avers that the three times their admission to membership was refused was for good causes and reasons; (3) denies that such refusal has caused and will continue to cause the obstruction, suppression and destruction of plaintiffs' business; (4) denies that it is of a public or semi-public character, that it cannot refuse membership to any licensed broker, and that its refusal to plaintiffs was arbitrary, capricious, discriminatory or contrary to public policy or public interest; (5) denies that its multiple listing service constitutes either an unlawful restraint upon the real estate business or an illegal restraint of trade; (6) denies causing any damage, loss or irreparable harm to plaintiffs; and (7) denies any wilful or malicious conduct or actions giving rise to punitive damages; and prays that plaintiffs' Complaint be dismissed.

After hearing on these issues on March 10, 11, 12 and 13, 1970 and upon submission of requests and briefs, the Chancellor hereby adjudicates the controversy.

FINDINGS OF FACT.

1. Plaintiff, Margaret Hill Collins, is a licensed real estate broker in the Commonwealth of Pennsylvania, and a Vice President of Suburban Fair Housing, Inc., a corporation for profit, organized and existing under the laws of Pennsylvania as a business corporation.

2. The defendant, Main Line Board of Realtors, is a corporation organized and existing under the laws of Pennsylvania as a non-profit corporation, being an association of real estate brokers engaged in the promotion and conduct of the real estate business.

3. Both plaintiffs and defendant have their offices in Lower Merion Township, Montgomery County, Pennsylvania.

4. Plaintiffs applied for membership in the Main Line Board of Realtors on three separate occasions during the years of 1966, 1967, 1968.

5. On each occasion the Plaintiffs were rejected for membership by a majority vote of the defendant Board, and on the last two occasions one other applicant was also refused admission.

6. Plaintiffs' applications were submitted in the proper form, reviewed by the Membership Committee prior to their submission to the entire Board, and processed in accordance with the by-laws of defendant Board.

7. These denials of membership to the plaintiffs Margaret Hill Collins, and Suburban Fair Housing, were

for cause and were the result of her unethical and unprofessional conduct.

8. The causes and reasons for the rejection of the plaintiffs were:

(a) Plaintiff, Margaret Hill Collins, on behalf of one of her clients, brought a charge against brokers of the Main Line Board of Realtors charging them with discrimination in the sale of homes, which charge was dismissed as without merit by the Pennsylvania Human Relations Commission.

(b) Plaintiff implied at the hearing before the Pennsylvania Human Relations Commission that the entire Main Line Board of Realtors practiced discrimination by stating the Suburban Fair Housing, Inc. was "the same as any other firm with one exception that we only accept listings that are available without discrimination."

(c) Plaintiff advised and requested a seller to sign an acknowledgement to a deed not in the presence of a notary public, with comment and advice to the seller that this is normal and customary practice despite the fact that such was contrary to the advice of seller's attorney.

(d) Plaintiff also created a disturbance and conducted herself in an unprofessional manner in demanding a key while in the office of a Main Line Real Estate firm.

(e) Plaintiff inscribed the name of a co-operating broker to a proposed agreement of sale without the consent of said broker.

9. In addition to the above particular incidents, the reputation of Margaret Hill Collins in the community as to her professional and ethical conduct was not good.

10. For the benefit of its members the Main Line Board of Realtors operates a multiple listing service under which notice of exclusive listings of a particular broker are circularized among all the members of the association, but all members of the defendant Board are not members of the service.

11. The direct use of the multiple listing service is limited to members of the Main Line Board of Realtors.

12. Members of defendant Board have on numerous occasions participated in and cooperated with plaintiffs in the sales of real estate in the Board's territory.

13. Participation in the multiple listing service is not essential to economic success in the business of buying and selling real estate in the territory of the defendant Board.

14. Defendant Board's multiple listing service, as it is used and operated, is not in restraint of trade. It is a useful, profitable and advantageous tool in the operation of their businesses by the members of defendant Board, which non-members do not enjoy.

15. Defendant Board has done nothing, nor failed to do anything which it is obliged to do, to cause any obstruction, suppression or destruction of plaintiffs' business. Plaintiffs are still actively engaged in the real estate business.

16. Defendant Board has caused plaintiffs no loss nor damage and have done nothing wilful and malicious toward plaintiffs that would warrant punitive damages.

DISCUSSION.

The plaintiffs have brought this action in equity, among other things, to compel their admission to the Main Line Board of Realtors. In order to consider whether or not this Court should grant plaintiffs the relief they seek three inquiries are necessary. Primarily, can a Court of equity examine the internal requirements for membership which a corporation in the nature of the Main Line Board of Realtors has established in order to determine whether or not said requirements are fair and reasonable? Secondly, has the Main Line Board of Realtors acted arbitrarily or with improper motive in denying the membership of its association to plaintiffs. Finally, have the plaintiffs any vested right to membership in the Main Line Realtors which this Court should recognize.

The Non-Profit Corporation Law in Article VI § 601, 15 P. S. § 7601 provides that:

> "Membership in all corporations shall be of such classes, and shall be governed by such rules of *admission,* retention, suspension and expulsion as the articles or by laws shall prescribe, *except that all such rules shall be reasonable,* germane to the purpose or purposes of the corporation, and equally enforced as to all members of the same class." (emphasis ours).

As has been stated, defendant Main Line Board of Realtors is organized as a non-profit corporation under the laws of Pennsylvania. As such they are bound by the above quoted section of said law. Clearly then defendants' articles and by-laws cannot contain any unreasonable or illegal provisions relating to admission procedures. If such provisions were to exist it would seem reasonable to believe that a third party who has been deprived of mem-

bership could ask the court to compel admission to membership by striking out such illegal provisions.

An examination of the requirements for admission to the Main Line Board of Realtors reveals no such provision as would be in derogation of plaintiffs' constitutional or civil rights.

In *Anderson v. East Suburban Multilist Real Estate Brokers, Inc.*, 44 D. & C. 2nd 53 (1966) the Court held that a provision resulting in the exclusion of the plaintiff from membership based on the fact that she was a woman would violate section 601 and as such would be against public policy and in violation of the laws of the Commonwealth of Pennsylvania. Similarly, a court in New Jersey in the case of *Grillo v. Board of Realtors of Plainfield Area*, 91 N. J. Super. 202 (1966) held that exclusion from membership by reason of the race to which the applicant belonged was unlawful. From the foregoing findings of fact, these cases are clearly distinguishable.

Also, plaintiff has not indicated in her Complaint, nor in her proofs, wherein the admission requirements are illegal or violative of her rights.

Aside from any expressed provision however, has the Board rejected plaintiff without just cause? In the presentation of its case the defendant offered competent proof that the character and conduct of the plaintiff was such as to justifiably preclude her from membership. Such a generalization, without more, certainly would not be sufficient justification, but here the defendant has particularized the statement with sufficient reasons all of which were communicated to the plaintiff. Plaintiff infers that the basis for her rejection lies in her open housing practices and defendant's alleged discriminatory policy in the selling of homes. Nowhere in any of the proofs has this been established. On the other hand the defendant has shown

competent evidence to establish the incidents it sets forth as cause for plaintiff's rejection.

Plaintiff has no vested property right which would compel her admission to the Main Line Board of Realtors. The rule is succinctly stated by the author in an annotation entitled "Compelling Admission to the Membership in a Professional Association or Society" in 89 A. L. R. 2d 964, 966:

> "Although the courts will compel reinstatement of a member who has been arbitrarily or wrongfully expelled, the general rule is that the Courts cannot compel admission of an individual into a voluntary association, since membership is a privilege and not a right, and even if a person's application is arbitrarily refused he is without legal remedy. It appears that the weight of authority favors the application of the general rule with regard to compelling admission to professional societies and associations also."

This rule was stated in the early Pennsylvania case of *Kearne v. Howley*, 188 Pa. 116 (1898) and recently followed in *Kassab v. Medical Services Association of Pennsylvania, Inc.*, 425 Pa. 630 (1967) (medical practitioner refused admission for failure to comply with by-laws of defendant association) and also in *Weiner v. Hospital Service Plan of the Lehigh Valley*, 13 D. & C. 2nd 689 affirmed per curiam at 187 Superior Ct. 244 (1958).

Even if it could be argued 'hat admission to the Main Line Board of Realtors carried with it a compelling economic necessity in that it made available the use of the multiple listing service, this would still not compel admission where justifiable cause had been shown for refusal of admission.

There is some authority to the effect that where an association exercises such a monopolistic control over the

area that admission is an economic necessity the courts can compel admission, *Falcone v. Middlesex County Medical Society,* 34 N. J. 582 (1961). However, even in this case the refusal to admit must have been based on an arbitrary and groundless decision.

In fact the multiple listing service of the Main Line Board of Realtors is not an economic necessity in the buying and selling of real estate. There was a great amount of evidence at trial bearing on the percentage of sales obtained from the service and, while the statistics were often in confusion, most brokers who testified stated that the use of the service, while advantageous, was not essential for economic survival as a real estate agent.

Further, the rejection of plaintiff's application for membership does not render the Board a combination which is unreasonably in restraint of trade. While it is true that the operation of the multiple listing service has an effect on trade, it is not every agreement which unreasonably restrains trade.

In *Anderson v. East Suburban Multilist Real Estate Brokers, supra,* the Court held:

> "We have examined the by-laws of Multilist and have come to the conclusion that it is nothing more than an entity whose members have banded together for the purpose of promoting their individual business interests as real estate brokers licensed by the Commonwealth of Pennsylvania. We find nothing objectionable to the joining together of persons who have mutual business interests for their own protection and the protection of financial gain so long as they do not violate the laws or public policy of the United States or of Pennsylvania."

Also in the leading case of *Board of Trade v. United States,* 246 U. S. 231 (1918) the Court ruled that while

it was true that in a sense every agreement concerning trade, restrains trade the true test of legality is whether or not the restraint imposed regulates and promotes competition or destroys it. The case of *Associated Press v. U. S.*, 326 U. S. 1 (1944) held an association's by-laws invalid where they were designed to allow its membership to block competitors from membership and thus deny such competitors access to news releases. The United States Supreme Court went on to point out that an association should be able to adopt and enforce by-laws restricting admission provided the competitive position of any applicant is not a prime consideration in refusing admission. The rules of admission into the Main Line Board of Realtors are reasonable on their face. They seek to bar from membership only those whose conduct would be detrimental to the association. The Main Line Board of Realtors does not interfere with the sale of homes by non-members. The operation of the association is for the mutual benefit of its members but the members are free to deal with non-members as they see fit. In all, the Main Line Board of Realtors is a reasonable banding together of licensed real estate brokers who have a legitimate interest in the qualifications of new members. The association, while having an effect on trade, does not impose an unreasonable restraint thereon and as such this court finds nothing in the by-laws nor in the Board's functions or operations which would be an unreasonable or unlawful restraint of trade.

The Main Line Board of Realtors, therefore, not being an illegally constituted association, and having rejected plaintiff for just and reasonable cause, should not be forced to admit her into membership.

CONCLUSIONS OF LAW.

Equity has jurisdiction over the parties and subject matter of this suit.

1. The applications of Margaret Hill Collins and Suburban Fair Housing, Inc. for admission to membership in the Main Line Board of Realtors were rejected for just cause and reason.

2. The plaintiffs have no vested property rights compelling their admission to membership in defendants' association.

3. The Chancellor finds nothing in the rules, regulations, by-laws, functions or operations of the Main Line Board of Realtors which constitutes a restraint of trade or a violation of the constitutional or legal rights of the plaintiffs herein.

DECREE NISI.

AND NOW, this 5th day of August, 1970, it is DECREED that the plaintiffs' Complaint is dismissed; plaintiffs to pay the costs; this decree shall become the final decree unless exceptions are filed hereto within twenty (20) days.

BY THE COURT:

HONEYMAN, *J.*

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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1973.

## No. 73-244.

MAIN LINE BOARD OF REALTORS,
*Petitioner,*

*v.*

MARGARET HILL COLLINS and
SUBURBAN FAIR HOUSING, INC.,
*Respondents.*

## ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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## INDEX TO BRIEF.


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS WHY CERTIORARI SHOULD BE DENIED | 8 |
| 1. Petitioner May Not Now Raise a Constitutional Defense Which It Never Previously Asserted | 9 |
| 2. The Constitutional Claim Asserted Is Insubstantial and Does Not Warrant Review by This Court | 10 |
| CONCLUSION | 13 |

## TABLE OF CASES CITED.


| | Page |
|---|---|
| Associated Press v. United States, 326 U. S. 1 (1945) | 11 |
| Cardinale v. Louisiana, 394 U. S. 437 (1968) | 10 |
| Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U. S. 457 (1941) | 12 |
| Interphoto Corporation v. Minolta Corporation, 417 F. 2d 621 (C. A. 2d 1969) | 12 |
| McGoldrick v. Compagnie Generale, 309 U. S. 430 (1939) | 10 |
| New York ex rel. Cohn v. Graves, 300 U. S. 308 (1936) | 9 |
| United States v. Greater Pittsburgh Board of Realtors, 1973 Trade Cases, para. 74,454 (W. D. Pa. 1973) | 12 |
| United States v. Long Island Board of Realtors, Inc., 1973 Trade Cases, para. 74,068 (E. D. N. Y. 1972) | 12 |
| United States v. Los Angeles Realty Board, 1973 Trade Cases, para. 74,366 (C. D. Cal. 1973) | 12 |
| United States v. Memphis Board of Realtors, 1973 Trade Cases, para. 74,056 (W. D. Tenn. 1972) | 12, 13 |
| United States v. Multiple Listing Services, 1973 Trade Cases, para. 74,221 (D. Ore. 1972) | 12 |
| United States v. Parke Davis & Co., 362 U. S. 29 (1960) | 12 |
| Wilson v. Cook, 327 U. S. 474 (1945) | 10 |


## CONSTITUTIONS CITED.


| | Page |
|---|---|
| United States Constitution: | |
| First Amendment | 1, 8 |
| Fifth Amendment | 1, 8 |
| Fourteenth Amendment | 1, 8 |

## QUESTIONS PRESENTED FOR REVIEW.

1. Where the Main Line Board of Realtors, Petitioner herein, raised no constitutional defense to Respondents' prayer for mandatory injunctive relief at any prior stage of this litigation, should not this Court deny the Petition for Certiorari in which the sole basis for jurisdiction is Petitioner's claim, asserted here for the first time, that its rights under the First, Fifth and Fourteenth Amendments of the United States Constitution have been abridged by the injunction decreed by the Pennsylvania Supreme Court?

2. Where the Pennsylvania Supreme Court concluded that the Main Line Board of Realtors had been guilty of an illegal restraint of trade under the common law of Pennsylvania in excluding Respondents from membership in the Board and its multiple listing service, and ordered the Board either to admit licensed real estate brokers, including Respondents, into immediate membership or to make its multiple listing service available to all non-member licensed brokers, should not this Court deny the Petition for Certiorari on the ground that there is no substantial constitutional question presented?

## STATEMENT OF THE CASE.

This is a Petition for Writ of Certiorari filed by the Main Line Board of Realtors (hereinafter referred to as "Main Line Board"), from a decision of the Supreme Court of Pennsylvania reversing a lower court decision and directing the Main Line Board to modify its membership regulations so that Margaret Collins and Suburban Fair Housing, Inc., the Respondents herein, and all other real estate brokers licensed by the Commonwealth of Pennsylvania qualify for immediate membership and participation in its multiple listing service, or, in the alternative, to modify its regulations so that non-member licensed brokers may immediately participate in the multiple listing service on equal terms with members.

Respondents, who are licensed real estate brokers, brought an action in equity against the Main Line Board (which has a membership consisting of approximately 88 firms and an aggregate of 370 brokers and salesmen),[1] seeking to compel the Main Line Board to admit respondents to membership and to participation in its multiple listing service forthwith, and further seeking damages for improper denial of membership (R. 11a-12a).[2] The case was tried before a judge of the Montgomery County (Pa.) Court of Common Pleas sitting without a jury as a chancellor. The significant facts developed at the trial are set forth hereafter.

The individual respondent, Margaret Collins, has been licensed by the Pennsylvania Real Estate Commission for twenty years, first as a salesman and, since 1958, as a real estate broker (R. 405a-406a). She is a vice-president of Suburban Fair Housing, Inc., the corporate respondent, a

1. In addition, certain officers and directors of the Main Line Board were originally named as defendants but they were dismissed from the case before trial and are no longer parties to this proceeding.

2. Reference is to the pagination in the printed record submitted to the Supreme Court of Pennsylvania.

real estate firm licensed by the Pennsylvania Real Estate Commission.

In each of the three years 1966, 1967 and 1968, respondents applied for membership in the Main Line Board and each time their applications were rejected (R. 702a-704a). In each instance respondents were proposed and seconded for membership by members of the Main Line Board and met the eligibility requirements specified in its by-laws (R. 757a). In each instance the Main Line Board's membership committee recommended that the application be denied and its board of directors did in fact deny the applications, twice unanimously and the third time by a majority vote (R. 121a-125a).

The Main Line Board's by-laws provide a procedure for handling applications for membership but prescribe no standards whatsoever for determining whether membership applications should be approved or denied (R. 759a).

Although the rejection of the first application was discussed informally with respondents, no written specifications of the reasons for the rejection were furnished (R. 314a-316a). Respondents were given formal notice of the reasons for denial of the second application by the Main Line Board's president who read a formal statement to Margaret Collins, but did not give her a copy. This document which was introduced as evidence at the trial (R. 630a; Exh. D-3, R. 802a) set forth five reasons, all of which related to the filing with the Pennsylvania Human Relations Commission of a complaint charging a Main Line real estate brokerage firm (member of the Main Line Board) with discrimination in connection with a particular real estate transaction.

The facts concerning this complaint were fully developed in the record. A prospective purchaser, who was represented by Margaret Collins, filed a complaint with the Human Relations Commission. After investigation, the

Commission found there was probable cause for the charge (R. 184a) and thereupon issued the complaint against the brokers (R. 711a-713a). After an extended hearing at which Margaret Collins testified under subpoena issued by the Commission, the complaint was dismissed (R. 729a), but the Commission noted its understanding as to why it had been felt that discrimination had been practiced against complainant (R. 726a). The Main Line Board took offense at the testimony of Margaret Collins in which she described Suburban Fair Housing, Inc. as being "the same as any other real estate firm with one exception that we only accept listings that are available without discrimination" (R. 802a). In this connection the Main Line Board, ignoring the fact that at the time of the statement owners were not obliged under Pennsylvania law to sell to any prospective purchaser without discrimination and hence that any broker could at that time lawfully accept a restrictive listing, asserted in its reasons for refusing membership that Margaret Collins had charged the Main Line Board generally with improper conduct and its member brokers with discrimination (R. 802a-803a).

At the time of the rejection of the third application no different reasons were advanced for the rejection than those given to justify the refusal of the second application (R. 327a).

At the trial, isolated insignificant instances claimed by the Main Line Board to constitute unethical practices on the part of Margaret Collins were asserted as justifications for the denial of membership, but none of these reasons had been asserted at the time the applications were denied and at least one of the incidents in fact occurred subsequent to the denial of the third application (R. 803a). Certain witnesses for the Main Line Board testified at the trial that Margaret Collins' reputation in the real estate community was poor (e.g. R. 443a, 470a), but other persons

including defense witnesses and former officers of the Main Line Board vouched for her good reputation (R. 142a, 160a, 433a-434a) and the record clearly indicates that the principal reason for objections to her reputation and ethical conduct related to her strong insistence upon the right of members of minority races to purchase real estate without discrimination and her participation in the Human Relations Commission proceeding previously described (R. 430a-431a, 477a-479a, 585a, 621a-622a).

The uncontradicted evidence was that no complaint against Margaret Collins had ever been filed with the Pennsylvania Real Estate Commission and that no question had ever been raised concerning her license (R. 409a).

The principal advantage of membership in the Main Line Board, unavailable to respondents, was participation and membership in the Main Line Board's multiple listing service, the use of which is limited to its members (F. F. No. 11, R. 684a, 779a). Under the multiple listing service a large proportion of the residential properties sold in the Main Line area are listed and made known to the members of the service, and all members are entitled to sell all properties so listed in cooperation with the broker holding the original exclusive listing (R. 777a-780a). The requirement that originating brokers submit their exclusive listings to the multiple listing service is the key to the entire procedure since it assures equal selling rights to all members and effectively excludes non-members from most sales.

Annual sales of properties included in the multiple listing service during the years 1965 through 1969 ranged from $41,000,000 to $70,000,000 (R. 705a-709a), and several members of the Main Line Board testified that 75% to 85% of their sales involved properties whch had been listed with the service (R. 133a, 146a, 171a). Several of the Main Line Board's members testified that the multiple

listing service is an effective and significant factor in the development of a successful business (R. 128a, 157a-158a, 574a). Notwithstanding this testimony the Chancellor, relying upon the conclusory testimony of some members of the Main Line Board, found that participation is not "essential" to economic success (R. 684a). The Supreme Court of Pennsylvania concluded, in this connection, that "a nonmember cannot compete in the buying and selling of real estate for clients as effectively as a member of [the Main Line Board]" (Petitioners' Appendix A4). It is interesting to note that in the Petition for Certiorari filed with this Court it is now conceded by the Main Line Board that "the importance of the multiple listing system to the real estate business is *overwhelming*" (Petition 43, emphasis supplied).

Respondents throughout the period did not have available to them and had no way of knowing what houses were for sale through other brokers or included in the multiple listing service, and they had to resort to advertisements in the newspapers and occasional observation of "for sale" signs in order to find some small percentage of the houses which were being offered for sale (R. 256a-257a). While there were instances in which members of the Main Line Board cooperated with respondents in making sales of properties listed on the multiple listing service, there were many other instances in which member brokers refused to cooperate (e.g. R. 269a-272a, 297a-302a) and they were under no obligation to do so.

The Chancellor filed an adjudication in which he concluded that there was nothing in the rules, by-laws or operations of the Main Line Board constituting a restraint of trade and he entered a decree *nisi* dismissing the complaint (Exhibit E to Petition). Exceptions to the adjudication filed on behalf of respondents were thereafter dismissed

with an opinion by the Chancellor and the decree *nisi* became the final decree (Exhibit D to Petition).

At no time during the lower court proceedings did the Main Line Board contend that Respondents' claim for relief by way of a mandatory injunction raised any question under the Federal Constitution, nor did they assert that their constitutional rights would be abridged in the event that the Court should grant the relief requested.

Respondents appealed to the Supreme Court of Pennsylvania which concluded that the Main Line Board was engaged in carrying out a contract or combination in restraint of trade, which was illegal under the common law of Pennsylvania, when it excluded Respondents from membership and participation in its multiple listing service. Accordingly, the decree of the lower court was reversed and the Main Line Board was directed to modify its membership regulations so that Respondents and all other real estate brokers licensed by the Commonwealth of Pennsylvania qualify for immediate membership and participation in the multiple listing service. In the alternative, the Main Line Board was directed to modify its regulations so that non-members might immediately participate in the multiple listing service on equal terms with members. The decision was rendered by a divided court with three justices dissenting. One justice filed a concurring opinion and another justice concurred in the result.

## REASONS WHY CERTIORARI SHOULD BE DENIED.

At the outset it should be noted that this litigation involved a claim asserted by Respondents that the actions of the Main Line Board in excluding them from membership and participation in its multiple listing service constituted a restraint of trade under the common law of the Commonwealth of Pennsylvania. There was never any claim asserted under the federal antitrust laws nor was any federal issue, statutory or constitutional, raised by way of defense. The case was tried under the law of Pennsylvania and the ultimate decision of the Pennsylvania Supreme Court was based on its conclusion that Petitioner had been guilty of a restraint of trade under the common law of Pennsylvania. Petitioner has devoted an entire section of its Argument to its contention that the multiple listing service of the Main Line Board is not a monopoly or an unreasonable restraint of trade. This argument is completely misplaced since this Court has no jurisdiction to review a determination by the Supreme Court of Pennsylvania that the actions of the Main Line Board constituted a violation of the common law of Pennsylvania governing restraints of trade.

In an attempt to bolster its position, Petitioner now, for the first time, seeks to raise a constitutional question by asserting that the order of the Pennsylvania Supreme Court abridges the constitutional rights of its individual members under the First, Fifth and Fourteenth Amendments of the Constitution. This effort must fail for two equally compelling reasons. First, this Court will not consider a constitutional question which was not raised by Petitioner at any time during the earlier stages of the litigation in the Pennsylvania Courts. Secondly, there is no substance whatever in the constitutional question which Petitioner attempts to raise at this time.

**1. Petitioner May Not Now Raise a Constitutional Defense Which It Never Previously Asserted.**

This is a proceeding in equity and from its inception Respondents sought mandatory injunctive relief to require the Main Line Board to admit them to membership or to make available to them its multiple listing service. Petitioner never raised any constitutional issue in its answer to the original complaint. Petitioner did not claim in the trial court, either at the trial itself or in the proceedings before the court en banc, that an order granting the equitable relief requested would abridge its constitutional rights or the rights of its members who were, of course, not parties to the action. Nor did Petitioner allude to any constitutional question before the Pennsylvania Supreme Court in brief or oral argument.

Throughout this litigation Petitioner has consistently based its entire defense on the proposition that the Main Line Board was not engaged in practices constituting a restraint of trade under the common law of Pennsylvania as contended by Respondents and that it had reasonable grounds for excluding Respondents from membership and from the multiple listing service. Those defenses have now been found insufficient by the Supreme Court of Pennsylvania and equitable relief has been ordered directing Petitioner either to admit Respondents to membership along with all other real estate brokers licensed by the Commonwealth of Pennsylvania, or, in the alternative, to make the multiple listing service available to them as non-members on the same terms as members. Having lost the decision in the Pennsylvania Supreme Court which found its defenses insufficient, Petitioner now attempts to raise a constitutional question for the first time. This it may not do in view of a well settled line of authorities in this Court. *New York ex rel. Cohn v. Graves*, 300 U. S. 308 (1936); *McGold-*

*rick v. Compagnie Generale*, 309 U. S. 430 (1939); *Wilson v. Cook*, 327 U. S. 474 (1945). In the *Graves* case the Court said at 317:

> "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution . . ."

More recently, the same principle was reaffirmed in *Cardinale v. Louisiana*, 394 U. S. 437, 438 (1968), as follows:

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

The constitutional question presented by Petitioner should not be considered since, as in *Cardinale*, it was never "raised, preserved or passed upon" in the Pennsylvania Courts below and is "raised here for the first time" on petition for review of the Pennsylvania Supreme Court decision.

**2. The Constitutional Claim Asserted Is Insubstantial and Does Not Warrant Review by This Court.**

Petitioner contends that compliance with the order of the Pennsylvania Supreme Court will interfere with the contractual freedom of the members of the Main Line Board and their freedom of association by requiring them to include Respondents in the multiple listing service. The in-

substantiality of this position is apparent. Freedom to contract is not unlimited. Clearly there is no freedom to enter into or participate in illegal contracts and here the Pennsylvania Supreme Court has held that the Main Line Board has engaged in an "illegal contract or combination" (Appendix A to Petition, A8). Associational relationships which are in violation of law are not permissible and it is absurd to suggest, as Petitioner has done, that the Federal Constitution affords protection to the Main Line Board in carrying out its illegal activities in restraint of trade. The following language of this Court in *Associated Press v. United States*, 326 U. S. 1, 14-15 (1945) is particularly apt in this regard:

> "It has been argued that the restrictive By-Laws should be treated as beyond the prohibitions of the Sherman Act, since the owner of the property can choose his associates and can, as to that which he has produced by his own enterprise and sagacity, efforts or ingenuity, decide for himself whether and to whom to sell or not to sell. While it is true in a very general sense that one can dispose of his property as he pleases, he cannot 'go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.' * * * The Sherman Act was specifically intended to prohibit independent business from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete."

Where exclusionary practices have been adjudged to violate the law, mandatory relief in order to rectify the situation is not only proper, but necessary. Many examples of this

type of mandatory relief come to mind. Refusals to deal which are adjudged in violation of antitrust laws and group boycotts may be rectified by orders which have the effect of requiring the violators to do business with persons with whom they had previously refused to deal. See, for example, *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission,* 312 U. S. 457 (1941); *United States v. Parke Davis & Co.,* 362 U. S. 29 (1960); *Interphoto Corporation v. Minolta Corporation,* 417 F. 2d 621 (C. A. 2d 1969).

A federal decision which has been cited throughout this litigation is particularly significant in this respect. *Associated Press v. United States, supra,* involved association by-laws which permitted members to block non-member competitors from membership and prohibited members from furnishing news to any non-member in advance of publication. This Court concluded that the by-laws constituted an unreasonable restraint of trade and the invalidation of those by-laws had the effect of opening up Associated Press membership and use of AP facilities to those previously excluded. The parallel to the instant case is evident.

Finally, the Court's attention is directed to a number of consent decrees recently entered in the federal courts which prohibit local real estate boards from excluding licensed real estate brokers from board membership or participation in multiple listing services. *United States v. Greater Pittsburgh Board of Realtors,* 1973 Trade Cases, para. 74,454 (W. D. Pa. 1973); *United States v. Los Angeles Realty Board,* 1973 Trade Cases, para. 74,366 (C. D. Cal. 1973); *United States v. Multiple Listing Service,* 1973 Trade Cases, para. 74,221 (D. Ore. 1972); *United States v. Long Island Board of Realtors, Inc.,* 1973 Trade Cases, para. 74,068 (E. D. N. Y. 1972); *United States v. Memphis*

*Board of Realtors*, 1973 Trade Cases, para. 74,056 (W. D. Tenn. 1972).

Clearly, there is no substance to the constitutional argument advanced by Petitioner. It should also be noted that the argument focuses on alleged interference with contractual and associational freedoms of individual members of the Main Line Board notwithstanding the fact that those members are not parties to this action nor are their individual operations at issue here.

## CONCLUSION.

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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